In the Supreme Court

OF THE

STATE OF CALIFORNIA.

No. 5380.

THE SPRING VALLEY WATER WORKS,
Respondent,
vs.
MONROE ASHBURY, AUDITOR, etc.,
Appellant.

MANDAMUS.
FROM
15th District Court,
San Francisco.

No. in Dist. Court,
8975.

No. 5388.

THE SPRING VALLEY WATER WORKS,
Respondent,
vs.
The City and County of San Francisco, et al.,
Appellants.

PROHIBITION.

No.

THE SPRING VALLEY WATER WORKS,
Respondent,
vs.
ANDREW J. BRYANT, MAYOR, etc., et al.,
Appellants.

REVIEW.
FROM
15th District Court,
San Francisco.

No. in Dist. Court,
20,578.

ARGUMENT OF J. P. HOGE, FOR PLAINTIFF.

FRANK EASTMAN, PRINTER, 509 CLAY STREET, S. F.

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA.

SPRING VALLEY WATER COMPANY

vs.

CITY AND COUNTY OF SAN FRANCISCO.

ARGUMENT OF J. P. HOGE.

FRIDAY AFTERNOON, May 11, 1877.

Mr. Hoge said:

MAY IT PLEASE YOUR HONORS:—

In what I have to say in these cases, I will endeavor to be as brief as possible, and to wander as little as possible from the points that are really in issue. As was said by one of the learned counsel, in a decision read during the course of the argument here: "The argument has taken a very wide range, but the points involved are exceedingly limited." To which points the Court proposed to confine itself.

Certainly, this argument has traveled a long way beyond any question really involved in these controversies.

I do not propose to follow the learned counsel that has discussed these cases for three or four days past in all these wanderings of his. Certainly not the least entertaining portion was the last of his argument—was his peroration. I liked it better than I did certain other portions of his argument, because it was in better temper. It was amusing and entertaining, and lacked a good deal of the malice which he put into many other sections of his remarks.

He took exception to what I supposed was a very complimentary allusion on the part of one of the counsel—my friend and colleague, Mr. Newlands. Mr. Newlands undertook to compare the counsel on the other side to a very celebrated philosopher, whose history is very well known,—to that philosopher, Diogenes. He referred to his life, and I believe to his historic tub, with his lantern in his hand, in search of an honest man.

I did not myself see anything that was offensively derogatory to my friend Swift, in likening him to so great a philosopher as Diogenes. But my friend Swift took exception to this comparison, and he came back on my learned friend, Mr. Newlands, in what I think was an unkindly spirit; in his retort saying that my colleague was too smart to live; that whom the gods love die young; that he might not live to come into the inheritance which it was intimated his father-in-law might be disposed to transmit to him; that he might not

live to enjoy the princely legacy for which he had reasonable or ambitious expectations.

Now, that was very unkind in my friend Mr. Swift. I don't think that the remarks made by Mr. Newlands warranted or justified so severe or personal attack. Therefore I say I liked much better that portion of his argument, or address, which was evidently uttered in a more kindly spirit.

My friend Mr. Swift thinks that he will himself die some of these days—from insanity! But, certainly, he will not die from insanity superinduced by those things which generally produce it. If he does die from insanity, his disease will not come from the use of whiskey; it will come, if at all, from water on the brain! [Merriment.] And he is not peculiar in that either. There seems to be the disease of water on the brain prevailing among all the counsel for the city in this case. I fear they are all in danger of dying late, if not early, from water on the brain.

I do not propose, if your Honors please, to waste your time in this kind of a discussion.

This is a Court of law; a Court of errors; a Court of last resort; where the rights of parties and the rights of the public are to be adjudicated upon grave consideration, upon principles of law, and reason and of right. And, therefore, all this kind of discussion is very much out of place; and this resorting to abusive epithets—which have been very freely indulged in here—are, in my judgment, speaking very much out of place. It is in bad taste. I will go further and say, it is lacking in the respect and pro-

priety which should characterize and govern the proceedings of a body like this.

I should be very slow, in any event, to follow the learned gentlemen who have preceded me on the other side, and go into any such kind of a discussion. Though I might do it very successfully, I will not do it.

This is nothing but a case which presents for consideration the rights of a private corporation, and the rights of a public municipal body. They are, in my judgment, pure questions of law, and of law alone. In my judgment, they are very simple and very few.

But here is a brief of one hundred pages, containing—well, I don't know exactly how many—containing, I suppose, two hundred and fifty authorities, which has been handed to us in the course of the argument—while the argument was progressing. Of course, we could not be supposed to know much about these authorities, or how they are pertinent to the questions involved; because we have had no opportunity to examine them. I only know about them from hearing counsel read some of them in the course of his argument.

In my judgment there is not a single authority cited here — certainly not one from which he has read—that really has any bearing, any pertinency or governing effect upon the real questions involved in the controversy, which are presented in the records—not one of them. I certainly shall not follow him in his discussion or his allusions to the question of property in water.

I shall not follow him in a review of the common law doctrines in relation to the water of flowing streams, which involves questions entirely outside of this record.

To say that a corporation which has invested millions in securing water and water privileges, in bringing it into a city in its pipes, in building aqueducts, in building reservoirs—acting, in this connection and in this operation, under Acts of the Legislature for the disposition of water and the collecting of water—to say that such a corporation has not in such a manner acquired property which is invested with all the insignia and realities of property, is to lay down an exceedingly novel proposition — a proposition so unfounded in reason and principle and authority, that I do not propose to waste one moment in discussing it at all.

Now, may it please your Honors, here are three of these cases here.

One is the case of the Spring Valley Water Company against the City and County of San Francisco and its Board of Supervisors and its Mayor and other officers. That is a petition for prohibition—an original case in this Court.

The second is the case of the appeal from the decision of the Fifteenth District Court, in the case where we make complaint against the Auditor of the city, Mr. Ashbury.

And the third is a case against the Mayor and others, on appeal from the Twelfth District Court, on a writ of *certiorari*, or "writ of review," as the Act styles it.

Now, these cases have been set down by the Court to be argued together.

The first being an original proceeding by the Spring Valley Water Company, in this Court, against the city and county and the Mayor and Board of Supervisors, to prohibit them from acting under certain resolutions, and from passing certain ordinances, by which the city proposes to take the property of the Spring Valley Water Company, and apply it to the municipal purposes of the city and county, without compensation.

The second proceeding is an appeal from the judgment of the Fifteenth District Court, awarding a mandamus to the Auditor to compel him to enter in the proper books the allowance of the claim of the Water Company for $92,000, as allowed and ordered paid by the Board of Supervisors, on final appeal from the decision of the Auditor, in conformity with the provisions of the Consolidation Act.

The third is an appeal from the decision of the Twelfth District Court, rendered on the writ of review, in which that Court decided adversely to the claim of the city.

Now, the object of all these proceedings, if your Honors please, seems to be to procure an early decision by this Court—the Court of last resort—of all the matters of dispute between the city and county, and the corporation; a decision which will settle all the questions involved between these two contending parties; and which will authoritatively determine, beyond further controversy, the whole matter, and settle the rights of the public and the rights of the corporation; and

which will put an end to any further difficulty or discussion in relation to those rights; with which decision, no matter how it may go, either party will be satisfied ; the rights of the public will be protected, and the rights of the private incorporators will be equally protected. With this decision, there is no further disposition, I apprehend, on either side, to make a future quarrel.

Now then, under these circumstances, I have not understood that there was any question made as to the form or applicability of the remedy sought by the original proceeding in this Court.

The question raised in that proceeding—in fact, in both of the others—the appeal from the Fifteenth and from the Twelfth, involves one or two questions which are identical in all of them.

That case from the Fifteenth District Court involves some considerations or principles which did not exist in the other cases, and it may be considered separately. I will endeavor to treat them separately, as far as I can, with some reference to the manner in which the case has already been discussed. As far as I can, I propose to separate these, and to discuss those questions and principles which are common with the cases.

And it matters not, if your Honors please. whether the special remedy sought in the case of prohibition, and in the case of certiorari, is maintained, so that the Court determines all the matters involved ; determines the principles here in question; and thus passes authoritatively, and distinctly, and finally, upon the rights of the respective parties. The confessed and asserted object of both is to have a full and complete de-

cision of these cases by the Court at this time. And it is particularly desirable that the Court should finally pass upon the rights of the parties as they may be involved in the matters which are set up in common in all these cases, so that no future litigation may arise, in which the remedy may be sought.

Now, then, as I said, I propose to discuss the matters which are common to all these cases, in the first place. I do not propose to go over the entire field of discussion which has been indulged in here, in the prohibition cases, nor in any of the other cases, further than is necessary with a view to the argument which I have proposed to make.

The petition sets up all the facts. The petition sets up the former decision of this Court. The petition sets up the actions and doings of the city, the resolutions that were passed, the ordinances that were passed, proposed, and threatened; and asks for a writ of prohibition. The answer avers the right of the city to tap the pipes, under the law of the 22d of April, 1858, and to take water in cases of fire or other great necessity—and that including all the water used, or that has ever been used by the city for any purpose whatever—and then it sets up the various uses to which they had put the water as being purposes of "great necessity" within the meaning of that clause in the Act.

They travel into a long account of an old suit, and of the question there involved in relation to the old San Francisco Water Works Company; referring to many other things which I do not

propose to take time in considering now. They set up and aver in their pleadings, that they now take, and have always taken the water for the same purposes precisely for which they were alleged to take it, in the case which has been already determined by the Supreme Court; and that they did not claim now any other right than they claimed then.

They set up some additional defenses, which will be alluded to at the proper places.

Now then it will be seen, if your Honors please, that these pleadings, stripped of the verbiage and useless averments and prolix statements with which they are filled—it will be seen by your Honors, if you take the trouble to read them—present a single question: that under the previous corporation act of 1858, this question stands first: that the City and County of San Francisco is entitled to take the water of the Spring Valley Water Company and appropriate it free of charge, without compensation, to all the municipal uses of the city, without limit.

And it appears, second, by the pleadings, that the city is entitled to do the same thing, because the Spring Valley Water Company is the successor of the San Francisco Water Works, and bound to give water free of charge for all purposes other than the sprinkling of the streets. Under the provisions of Orders 46 and 172, approved by the Legislature, it is alleged that the old company was bound by what is said to be a contract, to that effect; and the Spring Valley Water Company, having purchased the property and interests of that company, its franchises, etc.,

is said to succeed to these obligations. The Spring Valley Water Company having purchased the interests of the San Francisco Water Works, it is claimed that the former is bound, under the terms of its acquired franchise, to make the supply unlimited and without charge.

Now, I understand, if your Honors please, from an examination of all these pleadings, that these, and these alone, are the questions that are raised, and which present themselves to the consideration of the Court at this time.

These being the issues, then, we are met at the very threshold with the inquiry: Which of them; and what are they?—are now open to discussion upon the face of these records? Have they not, as we contend, been already determined by the previous adjudication of this Court, in the case of the city and county against the Spring Valley Water Company, as finally adjudged and reported in the 48th Cal.; which is set up and relied upon in the pleadings and proceedings here.

The proposition being on the one side—on our side—that either question which is now attempted to be raised, was included in, raised by, and decided by the Supreme Court, in the case referred to—in the case of the City and County of San Francisco *vs.* Spring Valley Water Company; and that not one of them is open now to discussion. That is the proposition on our side.

On the other side: Judging from the argument, I am unable to see what question was decided by the Supreme Court in the case referred to. It is impossible for me to see that any and all questions

are not still open to argument and adjudication in the present proceeding if the proposition on the other side, as I understand it, is correct.

It becomes necessary, therefore, if your Honors please, to make an examination into these matters; to inquire as to the various opinions delivered by this Court in the different decisions in that case;—what were the pleadings, what were the questions involved; what were the issues before the Court? And that will show the matter one way or the other—either that we are right or that our adversaries are right. We say that nothing new is now present in these pleadings; not a single fact which was not present, and which did not exist, and which was not well known at the time of the commencement of that case.

Now, then, if you Honors please, I do this without any doubt in my own mind as to the fact. I make this inquiry, not to weary your patience, but for the purpose of showing what was the real matter in issue and the real points decided, inasmuch as there seems to be some doubt in the mind of the Court as to what were the issues in those proceedings — what was decided, and how far the judgment covers the questions that are involved or attempted to be raised and re-argued here. Because, I will say in passing, with the exception of some little amplification, some little indulgence in the operations of fancy and imagination, in some instances, and some few additional authorities, there is no difference in the character of the case, as presented, and the main issues which exist here. There is not one single proposition made in this long argument here, since last

Monday morning—not a single proposition—that was not made and discussed, over and over again, in the case to which I refer.

As will appear presently, the case went through a long discussion—debated over and over again, orally in the Court, by briefs, by long arguments, written and printed; discussed by a great variety of counsel, both on the part of the city and on the part of the corporation. And I say that, in that discussion, every one of these questions was debated to the largest extent—every one that can be raised in these cases—with the exception of the appeal from the Fifteenth District Court in the Auditor's case—with the exception of a few questions involved in that case and not involved in the rest of them. I repeat, that, with that exception, not one of these questions here presents any new issue. There is no question here which was not again and again presented, by printed argument and by oral discussion, at that time; and not one which was not passed upon, directly and specifically, by the various opinions delivered by this Court.

Now then, if your Honors please, I propose, very briefly, to go over that case and give my opinion as to what was decided, and thoroughly decided, by the Court at that time. I will not stop to read portions of the opinions from the books. I will refer to the pages where you will find the points discussed, to which I allude in each instance.

As this Court said, on another occasion, in the case of Sullivan *vs.* Triunfo Gold and Silver Mining Company—(by the way, I do not

propose to read any authorities from the books, as I have stated; as it is easier to read them from my notes, giving the number of the volume and page)—in the case of Sullivan *vs.* Triunfo Gold and Silver Mining Company, (39 Cal., page 459): "Where the alleged new fact existed at the commencement of the former action, in which the point at issue was the same, and the plaintiff neglected to avail himself of it, he is not entitled to set it up in a subsequent action."

Now this is a simple announcement, by this Court, of a well-settled determination—a well-settled determination of law—that a decision and judgment includes every point involved, or which might have been raised, whether raised or not.

Mr. Justice RHODES. You mean, upon the issues, as presented?

Mr. HOGE. Yes, sir. I will explain myself thoroughly. So well settled is that determination, that you can scarcely take up a law-book, treating of such subjects, where this determination is not laid down, clearly, and definitely, and distinctly, in so many words. And I say that, on the former arguments of this case, all these questions were gone into, and a great variety of authorities cited and relied upon. Your Honors will find this to be the fact, if you take the trouble to look into the records, and into the petition for a re-hearing,—into the arguments on the part of the Spring Valley Water Company on one occasion, and into the argument on re-hearing, you will find all the authorities to which I refer gone into. And, as I was about to say, so well settled is this determination, that you cannot take up a

report or a law-paper in relation to matters of this sort, where you will not find it laid down as a matter fixed and unalterable. During the course of this agument, on yesterday morning, I happened to pick up the Pacific Law Reporter, in which was printed a decision of the U. S. Court, bearing on this question, the opinion being by Justice Field. It is a decision rendered at the October term of the Supreme Court — a few months ago — and not yet reported in the volume. That was the case of Davis *vs.* Brown *et al.*, Judge Field delivering the opinion of the Court. It is reported in the *Pacific Law Reporter* for May 8th, 1877. And he goes on to discuss this question of estoppel by judgment, etc. He says:—

"So far as the demand involved in the action is concerned, the judgment has closed all controversy; its validity is no longer open to contestation, whatever might have been said or proved at the trial against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it."

There is not a single case to the contrary anywhere, that has ever fallen under my observation. The business is, first to inquire and find out what were the issues; and the judgment in everyone of the cases is, that the decision in the particular case concludes forever between the same parties, in the same case, all the questions involved; and that they can be arranged in no other form or shape. No matter what might have

been said; no matter what arguments might have been offered; no matter whether the decision was correct or incorrect; it has closed litigation between those parties. There is no case that holds different. When you have ascertained what was in issue, what the record did present for adjudication, what the Court pronounced upon, what was the matter set forth, it forever concludes the rights and obligations and duties of the parties, with respect to those issues and records and matters, in whatever shape they may afterwards be sought to be raised, or in whatever kind of proceeding an attempt may be made to resist the litigation. Now, if there is one single case to be found against that proposition — broad as I make it—I would like to see it. And whenever the issue is brought up, that a matter has been decided in this way, it is the adjudicated duty of the Court to answer as to the nature and character and scope of the issues involved; and then the judgment of the Court, in that case, must be, and will be, in conformity with its prior decision. And when an issue of this kind is presented at the threshold of the argument, in such a case as this, the Court will undoubtedly require the parties who contend that the matter has not already been settled to show wherein the difference exists, what issues were not legitimately involved, what points of the judgment now sought were not fairly within the scope required, as submitted to the judgment of the Court, and as acted upon by the Court in the ultimate decision of the case.

Now, I will undertake to show your Honors that this Court never would have arrived at the

conclusion which they announced, without passing upon these matters now raised in these cases. The right now claimed, I say, was necessarily involved ; and if the propositions that are now contended for by counsel are correct, the Court would necessarily have arrived at a conclusion directly contrary to that which they did pronounce. If the arguments that have been submitted by counsel to you, during this week, are correct and legal, then your judgment in the former case should have been directly the reverse of the conclusion at which you did arrive. I say that that is a matter of necessity, a deduction which is inevitable. I speak, of course, of legal necessity ; not of great water necessity. As a legal necessity, the Court would not have arrived at the conclusion which they did, without passing upon the questions here involved ; and they could not have arrived at the conclusion which they announced, and at the same time have admitted the arguments now contended by counsel to be correct and conclusive.

And I will undertake to show you that they did directly comment on the very questions which have been raised here,—that the court did decide the very issues now before you.

The question was, as to the right of the City and County of San Francisco to take water of the Spring Valley Water Company, free of charge, for all purposes which they now claim to take it free of charge, and under the same laws and principles under which they now claim it, the same ordinances, the same provisions of legislative action, everything, in fact, which they now spread upon

the pleadings; it was all involved in the issues, and insisted upon in the arguments then.

Now then, the very first appeal was taken in the case of San Francisco *vs.* Spring Valley Water Works Company, in the July term, 1870. The decision will be found in the 39th of Cal., p. 473. The pleadings were almost identical with those that afterwards came up on the second appeal, identical with those presented and relied on in their very records. Now, what was the decision of the Court? What was claimed at that time? And what did the Court decide in the very first opinion?

The Court held that the rights of the parties were not governed by these provisions of law and the ordinances in relation to water works,—the San Francisco City Water Works Company. But, on the contrary, they decided that the rights of the parties were governed by the provisions of the Ensign Act; and they dispensed with all these arguments in relation to the San Francisco Water Works Company. And why? Because the provisions of the Act of April 8, 1863, placed these two companies, the Spring Valley Water Company and City Water Works Company, upon a par. And they decided that the city would not claim water free at all, except for the purposes and within the exceptions and provisions set forth in the Ensign Act. That was the first decision of this Court, upon a full argument upon the entire case—an argument really upon these ordinances and these Acts of the Legislature giving force to them—because I will attempt to show, before I have done, that they did not have any force,

except through the Acts of the Legislature. Your Honors decided that it was beyond the power of the city council to determine this matter. Upon an argument which completely presented all these issues, the Court takes up the case and decides that the rights of the parties are not governed at all by the rights of the City Water Works Company, but are to be determined alone as growing out of the Ensign Act.

That was the decision of the Court, upon which the case went down, and upon which there was a second trial in the Court below. Then there was a second appeal, the judgment being similar in the second trial to the judgment in the first trial.

The first opinion which this Court rendered, which has found its way into the records, was given on the 16th of July, 1873; it is reported in a pamphlet decision of this Court. The Court decided that the rights of these parties in these suits are still governed by the Ensign Act, and by the Ensign Act alone. That, in consequence of water having been introduced into the City of San Francisco by the City Water Works Company on the 16th of September, 1858, the Spring Valley Water Company became liable upon that event; and, under the provisions of the third section of the Ensign Act, it was bound to furnish its quota for fire and other municipal purposes. Still holding that the rights of the parties depended, not upon these ordinances, not upon the general law—for we have not come to that yet—but upon the provisions of the Ensign Act, that the occasion referred to in that section had arisen ; that, subsequent to the Ensign Act, and

on the 16th of September, 1858, water had been introduced by another company ; and, therefore, under the last clause of the third section of the Act, this other company became liable—to do what? It became liable to do what that second clause prescribed that it should do.

The first clause provided that the company should only be liable to furnish water for fires, during the pendency thereof; but when this event happened ; when water was introduced by the new company, it is provided that water shall be supplied, not only for fires—a quota of supply for fires—but for all municipal purposes. The claim was made, or sustained, by virtue of that provision, and that provision alone.

Now, that was the second decision that was made. That was on the 16th of July, 1873.

A petition for a rehearing was filed. This Court granted a rehearing. The case came up again for argument. It was re-argued again, orally and in printed briefs, in 1874. The case was then reported in 48th Cal., p. 493.

Now then, what was the decision on this occasion? That was the third time when this case came up for discussion before the Court upon all the questions involved in the record. And we say that the case involved all the questions that appear in the records here, with the exception to which I have already alluded. It had been decided that the rights of the Spring Valley Water Company were to be measured, and measured alone, by the provisions of the Ensign Act, the third section regulating their rights, and by no other Act; that no other proposition of law gov-

erned them ; that they were controlled by no other provision, statute, or ordinance; but upon all the issues directly within the record, raised and discussed, it was held that their rights were governed by the third section of the Ensign Act. It was held that they were liable to furnish their quota of water, not only for fire but for all municipal purposes, without limit as to the extent of the supply, and without right, presumably, to make any charge therefor.

Now, then, on this occasion, the Court took a new departure. On this occasion the Court held that corporations can only be formed under general laws; that the rights and privileges, duties and responsibilities, of corporations, arise under and are governed by the general law of the land; that the Legislature cannot, by special law, confer privileges or exact duties from existing corporations; and that the rights and duties of the Spring Valley Water Company must be decided by the general law under which it was organized, and is under no obligation to furnish water to the city and county free of charge, except for fires. The Court disposed of every issue in that case. They disposed of your City Water Works Company; of your ordinances; of your contract, as it was alleged or was called. They set aside the whole Ensign Act; they declared that it had no application. They declared that you had to look to the general law of incorporation for the rights on one side and the duties on the other; that the rights and duties are to be measured by the general corporation law, and by that alone; that the Legislature cannot, by special law, confer

privileges on or exact dues from existing corporations; that the rights and duties of the Spring Valley Water Company must be decided by the general law under which it was organized, and that it is under no obligation to furnish water to the city and county free of charge, except in case of fires. (See pp. 514 and 515 of 48th Cal.)

His Honor, Judge Crockett, entered into a very elaborate discussion of the points involved in the case. And in the decision in the original case on this hearing, and in the decision on the re-hearing, we say that the whole subject was thoroughly canvassed and all the issues completely decided. In the opinion on p. 522 of the 48th of Cal., the Court holds that corporate powers cannot be granted, enlarged, or modified by special act, and that the introduction of water into a city for the use of the inhabitants and the corporate authorities, is not a municipal purpose, etc. The Court decided that the company is subject to no duty, except those prescribed by the Act of 1858; the duty being, to furnish water for fires and other cases of great necessity.

The city and county, dissatisfied with the judgment, applied on petition for rehearing, and this Court delivers a second opinion and judgment in the premises, from which I have made a quotation.

The Court comment upon the third section of of the Act of April, 1858, providing that all privileges hereafter granted for the introduction of water into San Francisco are granted to companies incorporated under this Act. It therefore became a part of the general law, to which reference was had in the ultimate decision of the

case. It is explicitly stated that this general law did not render it incumbent upon the companies organized under it to furnish free water to the city free of charge, except in case of fire or other great necessity. And dwelling upon that, in answer to the argument of counsel upon the other side, the decision was complete and conclusive.

The decision in this case left the Ensign Act unconstitutional. The Court held that the provision of the Act on which reliance had been made did not have the effect or authority which was contended for it.

The Court then take up the position and claim of counsel, that the Spring Valley Water Company is liable to furnish water, etc., as the successor of the San Francisco Water Works Company. And the Court answer it and dispose of that question finally. Under the provisions of the general law of the 22d of April, 1858, there is a direct disposition of everything that is now insisted upon as left open. That is at page 527.

It was again contended, in order to maintain the Ensign Act, that this was a mere grant of an easement. And the Court goes on to answer that proposition. The Court discusses the grant of an easement as contended for: not to be a grant of corporate rights, but only an easement permitting the company to lay pipes, etc., subject to certain duties. It was there contended that the law did not make a grant of corporate rights, but only the easement permitting the company to lay pipes through the city, subject to certain duties; the question being as to whether it was a

grant of corporation power at all, or a simple grant of easement permitting them to lay pipes through the streets of the city, for the purpose of conveying water, subject to the duties imposed upon the easement.

The Court, in answer to that, say this: that all corporations had this right by the general law; and that the only legal effect of the Ensign Act would be to impose duties and confer rights essentially different from those of other corporations under the general law. And they say that this cannot be done by a special act. And they go on and hold that such a grant is purely a grant of corporate power; that it is not a mere grant of easement, for the company to take advantage of by laying their pipes through the streets and carrying water for distribution to the people, but that it is a direct right. This is doubly applicable to the city ordinances which purport to grant an easement coupled with conditions. They make this distinction between the rights of a corporation under the general law and the rights of this corporation, which they undertake to allow to come into the streets of the City of San Francisco with their pipes, and secure to them rights and privileges which no other corporation in the State could secure. This was one of the very provisions which your Honors relied upon and commented upon in the Ensign Act.

It was proposed to fix rates then, and compel the people to pay them until the corporation shall have released a certain percentage, irrespective of and in addition to the rights of all corporations

under the general law of the State. This Court held that that could not be done by the city.

And this cannot be done by the city, any more than by the Legislature. The city cannot have any powers that the Legislature itself does not have. The Legislature could never have passed such a law, as your Honors have held, under the Constitution. The city knew that, and they came to the Legislature to have these acts confirmed. They came to the Legislature to have special acts passed to confirm these. The only way in which they got any authority whatever, and acquire any validity whatever for their acts, is by virtue of these statutes which confirmed their action directly.

This matter appears, not only in a decision of this Court in the main case, but in the case of the Truckee and Tahoe Turnpike Road Company *vs.* J. B. Campbell, reported in 44 Cal., pages 90 and 91 ; also, in the case of Waterloo T. R. Co. *vs.* Cole, which is not yet reported.

Now, I come to the opinion of Mr. Justice McKinstry, upon which much has been said. That you will find at page 530. In this opinion, the learned justice agrees with the prevailing opinion delivered by Mr. Justice Crockett, and he makes an additional argument to sustain the proposition advanced by his Honor, Justice Crockett. And he contends, with great force of reasoning, that the Legislature could not pass a special Act granting powers or privileges to a particular corporation created under a general law not enjoyed by all corporations ; nor could the Legislature pass a special Act limiting or burdening with peculiar

conditions the rights or powers acquired by corporations from the general law.

We are to ascertain the rights, privileges, powers, duties, and obligations of the Spring Valley Water Company by reference only to the general law under which it is incorporated.

And then he goes on to comment on these different rights of compensation as strengthening and rendering conclusive the argument which he has made. On this point, that these rights or impositions can not be instituted by a special act as against or in behalf of such corporations; that these corporations must get their rights from the general law, if at all, which secures the same rights, duties, privileges, responsibilities and obligations to all corporations—which I will attempt to show is the true construction of the Constitution, in another portion of what I have to say.

I need not repeat the statement that this language is directly applicable to the claim under the City Water Works Company. I may have occasion to refer to that in another portion of the case.

Now, in the general order of this matter, I come to this opinion of Mr. Justice Rhodes. That will be found on page 533—Justice Rhodes' dissenting opinion.

While agreeing substantially with the argument of the majority of the Court, Mr. Justice Rhodes thinks that the question did not really arise upon the record, as has been stated. And he discusses the case upon the ground which is asserted by Mr. Justice Crockett, in his opinion denying the re-hearing. He agrees to the constitutional argu-

ment of the majority, and thinks the question does not arise in the manner suggested. While agreeing with the construction put by the Court upon the provision of the Constitution, referred to, he contends that the proposition set forth is not really involved in the record. And his dissent is placed upon that ground alone.

It would seem to me, then, if your Honors please, upon this brief review of these opinions, that an end is here put to all discussion as to what he decided in the case referred to.

The power of the city and county, and the rights, duties and obligations of this corporation, it would seem to me, are clearly and definitely and finally determined by the judgment of the Court and also by the opinions which are delivered.

But it seems now, if your Honors please, to be considered from a certain passage in Judge McKinstry's opinion, that what is a "great necessity" is left still an open question by this decision. And that is the only proposition upon which could be based a question of this character—the question as to whether there was anything whatsoever left undecided in the judgment in that case which would permit the argument here upon the main points at issue. It is contended that Judge McKinstry in what he said withdrew from the operation of this decision this question as to what constitutes "great necessity," his opinion being thus interpreted—one Judge dissenting and one Judge not sitting—his concurrence operating to make the decision of the Court.

Now let us see what that statement is.

On page 531 of the 48th Cal. you will find the passage. The Judge is discussing the constitutionality of the Ensign Act; and he says: "The general law required all water companies to furnish water to the extent of their means, and free of charge, to the city or town to which water was conducted, 'in case of fire or other great necessity.'" Recollect that you are now discussing the constitutionality of the Ensign Act in this action. The Judge goes on: "I express no opinion as to the precise meaning of the phrase 'other great necessity.'"

And then he goes on and assumes that the construction given by the Court on a former appeal, when he was not on the bench, to the effect that these words did not include every municipal purpose, was correct. And then he proceeds upon that assumption to discuss the question which he was then mainly engaged in discussing, to wit: the constitutionality of the Ensign Act.

Now, may it please your Honors, is there anything in this to aid the proposition on the other side?

As I have attempted to show, and as I think I am borne out by the record, the question was necessarily involved, discussed in the briefs and in the opinions, and necessarily included in the decision.

Now, the learned Justice in using this language was merely reserving the expression of his opinion as to the precise meanings of the words used; as to what causes and under what circumstances these words would be applicable. That he did not hold them applicable to, and bearing upon,

the case then before him, seems to me sufficiently apparent. That was not a case of great necessity. And it was not a case of "other great necessity" within the meaning of that term. And therefore it was not necessary for his Honor, the learned Justice, to express an opinion as to what cases the term would apply to—as to what cases that term on which he reserved would apply. He is not, mind you, intimating any doubt or expressing any want of concurrence in what has been said which may bear upon the subject. And in his judgment upon the case before him, he was not necessarily called upon to give an expression of opinion as to the proper definition or limitation for this term, and so in passing he reserved his construction of the words. In his opinion it was not necessary, at that time, for anybody to go explicitly into a discussion of the meaning of that term. It was his incidental remark in an opinion in which he gave judgment in concurrence with the majority of the Court. But this, certainly, does not detract from the significance or the effect of the judgment which was rendered. That judgment was expressed more particularly in the opinion of Mr. Justice Crockett to which I refer.

Mr. Justice McKinstry says he does not undertake to go into a discussion with respect to the cases which would properly come under this term.

Mr. Justice McKinstry says that on the prior appeal, and before he came to the Bench, it was held by the justices that these words did not include every municipal purpose ; and he assumes that that construction was correct. I understand that by the force of law and reasoning, he could

not have concurred in that judgment, except he based his concurrence on that assumption, unless he believed that when the Court were ascertaining the Spring Valley Water Company, under the Act of 1858, the case was not one involving any great necessity. It seems to me there can be no question upon that subject, that that was the opinion of Mr. Justice McKinstry. I have not heard him intimate other than that or different; that the opinion did not call upon him to determine what precise character of case the exception referred to would be applicable. It certainly was not necessary for him to go into any such construction or definition.

The Act of 1858 says that you shall furnish water to the full extent of your means, even though it takes up all the water in your reservoirs, and though it exhausts all your property, you shall furnish it in case of fire or other great necessity. And I think it was absolutely essential, in order to come to the conclusion at which the Court then arrived, that they should pass upon the question as to whether the uses and purposes set up in those proceedings were such uses and purposes as made a case arise under the exceptions of the Act of 1858.

Now, if your Honors please, I have hurriedly gone over the whole of these opinions, from the first to the last; and I submit that it forecloses all discussion upon any one of these questions which have been raised here, with the exception of the questions that rise in the case of the appeal from the Fifteenth District Court.

But I am not going to rest, if your Honors please, even upon that proposition. I have something to say upon the question, if it is open to discussion. And I will attempt to show that, if the question was open for discussion, it is clear that your Honors could not arrive at any conclusion; if it was not foreclosed by the opinions which this Court has already delivered on the rights of these parties.

This provision requires water corporations to furnish water in case of fire or other great necessity. Now, what is the meaning of that phrase in the connection in which we find it? What does it mean? If my opponents are correct in their construction—if the other side is correct in their proposition on this subject—and their whole case depends upon its construction—then this expression means and includes the use of water for every and any purpose for which the municipality can use or desire to use water. There is no limit to the extent of that proposition. You cannot step beyond this. All the ordinary purposes for which a municipality desires water, is, and must be, covered by the phrase, according to a wise interpretation. It is all covered by this provision.

The first remark that would strike anyone in reading this provision, and considering its intent and meaning—at least the first thing that would strike me—would be: What was the necessity of this provision at all, if the object was to include every possible use of water? Why did not the Legislature say at once, and that in very plain and definite language that admitted of no mis-

construction and no mistake, that water should be furnished by the corporation to the city and county, without compensation—free of cost—for all municipal purposes whatever? Why should they pervert language, and use language which presupposes, upon the very face of it, that there were purposes for which water was not to be furnished free of compensation? I say that the very language itself presupposes that.

Certainly it was in the mind of the Legislature, when they used that language, that there were purposes for which water was not to be furnished to municipal corporations or municipal bodies without compensation; and the question is: What are those purposes? The companies are to furnish water free, in case of fire or other great necessity.

One would suppose that the connection in which a term is used, gives character and meaning to it; certainly where there is anything doubtful about it. It has always been so held, in all cases of this kind. They are to furnish water free, in case of fire or other great necessity.

A case of fire is an unforeseen thing. It is a sudden calamity which may happen at any time. It is fortuitous; it may happen and endanger the public safety at any time. Therefore, it immediately strikes the mind of the Legislature, in passing this law, that this kind of provision should be made for it. And it is at once provided for. Fire is regarded as a great and overpowering necessity, for which the exception of the use of the property of the company, without charge, is made imperative. Fire en-

dangers the property of the public. The lives and property of the citizens of a town are imperilled by it. And the legislators wisely said: We will enact that the corporations organizing under this law, for the purpose of procuring supplies of water to the inhabitants of the various municipalities, shall give this tribute of their property when occasion demands. The provision was industriously inserted into the statute. But then there may be other occasions which may require the application of the same precaution—indefinite, sudden, unforeseen, exceptional—against which the public should be protected; and the provision is made also, that these cases should be provided for in the same manner. Therefore, the case is made broad enough to cover similar unforeseen dangers. But that you can stretch the expression beyond this, to cover the ordinary purposes for which the municipal body may desire water, seems to me preposterous and altogether out of the question. It is against reason, and against common sense.

I do not care now to enter upon a certain conversation which took place between one of the Justices of the Court and Mr. Swift in relation to this question. I have it upon my notes, and may allude to it hereafter.

There were one or two cases cited here, and read over, which did not seem to me to have very much bearing upon the question. I think you can't find much authority on a question exactly like this; because it depends upon the plain meaning of the provision itself—upon its own language, and the connection in which you find

that language, and the general object and purpose which was manifestly in view by the Legislature enacting the statute.

The case of Mills *vs.* Barbour, reported in the 24th Wendell, seems to me to bear somewhat directly on the matter under consideration.

That was an action to recover rent upon a lease. The lease contained an exception to its operation in case of fire or other casualty. The fact is, that the term here—"in case of fire or other great necessity"—means precisely that very thing—upon the casualty of fire or other great necessity. Then, in that case, water was to be furnished free, and the case of fire is to be carried, for the sake of interpretation, to other cases, or cases of necessity—great necessity. In case of fire, or in case of other great necessity. That is to say, upon a casualty of fire or upon any other like casualty of great necessity. Then, and in that event, the Legislature will put this duty upon this creature of legislative power. The Legislature will make this creature, under the law of its creation, contribute, in cases of great public danger, to the protection of the public—the protection of that public for whose uses they are empowered to make these supplies of water. It was the very object and purpose of this statute—of this particular section and clause—as I shall attempt to show; and they never could have thought of going further than that, I am confident, under any judgment of good sense and fair reasoning.

Now, the provision in the question in the case referred to was made an exception in the lease.

Then, and in such an event, the party was not to pay any rent at all. The exception was from the operation, or the happening of fire, in case of fire or other casualty. Here the words are, "In case of fire or other great necessity."

The difference was, that the city had cut down and taken part of the premises for a public street; and it was contended that this fell within the exception, and should relieve the party from paying rent. But the Court held that it was not within the exception. And the Court say—that which, it seems to me, must strike anybody with great force—which any one would say, I think, in the consideration of such a question—the Court say that the term, "other casualty," refers to some fortuitous interruption of the use. "This is clear, not only upon the import of the words, but from the connection in which they are found. No casualty has occurred; on the contrary, whatever has taken place has been in pursuance of established law, and might have been, and probably was, anticipated." Such is the language of the Court in that case.

It seems to me that this reasoning applies, with overwhelming and conclusive force, to the case in hand. Should not the Legislature have anticipated that the municipal government would want water for a thousand purposes? ordinary municipal purposes? Why resort to such expressions, if it was simply intended that all municipal wants of water should be provided for? Did not the Legislature know that the city government could not be carried on without water? Did not the Legislature know that the municipality officers

could not perform the great duties devolving upon them as a branch and arm of the State government, without a supply of water? and *that* required daily for the purposes of the municipality? Could it be pretended that such a want might not be, and should not be anticipated? and that therefore it could by no manner of means fall within the phrase, in such a connection, "other great necessity?" Water is needed to protect the public interests in innumerable ways; to carry on the operations of the government; for the immediate supply of the officials of the municipality, and those under their charge in the various institutions of the city. Are not these wants notorious? and such as every legislator, however stupid or unobservant, must take full notice of? How can the gentlemen claim that such ordinary wants for such an indispensable article, are to be classed under this term used in such a connection, always remembering that the very sentence itself directly presumes the contrary.

So in the case of Bigelow *vs.* Collamore, in the 5th Cushing, 227, there was a very similar exception in the lease. It provided for loss from fire or other unavoidable casualty — relieving the party from the payment of any rent in such an event. It was the case of a mill rented or leased. The lease contained an exception, relieving the party from his liability and responsibilities under the lease in case of loss from fire or other unavoidable casualty. The mill broke down because the walls were rotten. They had been in use for a long time, and had become infirm and rotten, and it was contended, in that case, that this disas-

ter came within the exception, "unavoidable casualty." But the Court say that this is not within the exception at all. The Court say that this is not an unavoidable casualty; it could have been anticipated and provided for. It did not fall within the meaning of these terms; their object and intention and purpose being to meet a totally different condition of affairs—an entirely different character of loss or calamity. That exception was to guard against those events which could not be anticipated. You could not anticipate fire, and that was, therefore, provided for. You cannot anticipate some other great calamities or convulsions when the public safety would be endangered.

During the course of this argument, if your Honors please, the question has been asked several times, Can you state any other instance of great necessity? Can you give any other illustrations, or any illustration, beyond the case of fire? I think I could state many such occasions, in which the exception here would be binding upon the company. I don't think there need be any apprehension that the argument would fail, on our side, because of incapacity to enumerate other great necessities which legitimately come under that language used in that connection. I can suggest many such occasions. I might suggest occasions where the public safety would be endangered by sudden plague—by cholera, or other sweeping pestilence. There are a thousand other ills to which a community is liable, which might, in their violence and sweeping character, demand the absolute and entire use

of the property of this company, for the cleansing and saving purposes of the whole commu nity. I think there would never be any question, when such occasion arose. Indeed, the company has never evinced any disposition, nor has it any disposition, to avoid the expense devolving upon it legitimately under this phrase. There might be enumerated a large number of cases of casualty and great necessity, where the municipality has need to use large quantities of water in order to protect the lives and property of the public, where there could be no possible question as to the duty of the company to open their hands to the fullest extent.

And you will remark that, in order that this company may be able to meet precisely such great cases of public necessity and casualty, they have another, and if you please, an incidental right to protection under the law. Not that it is precisely any argument in their behalf; but every citizen is interested in maintaining the integrity and power, for beneficent purposes, on the part of this corporation, whenever the hour of great public calamity requiring its resources shall have arrived.

And it was to guard against these great cases of public danger, that this clause was added to the provision for a full supply, free of cost, in times of fire. The supply is to be, at times of fire, and on other occasions of great necessity. It was eminently right and proper that the Legislature should burden these privileges with this obligation, and contribution for the public protection. And the selfish considerations of the members of the corporation itself would have demanded such

a provision in its general organic law. But when you come to talk of taking the property of this company for the uses of the city—for the ordinary purposes of the municipality—free of compensation, as a taking under this clause, you are talking very different matter.

The construction contended for, is to deprive the language of all meaning, and to defeat the very intention and object of the provision. It is to impute to the Legislature, in using language sufficiently definite and clear to effect the object in view—the design to take from all such corporations their entire property, if necessary, and apply it to the ordinary public uses of the city and county, without compensation. A contradiction upon contradiction! an assumption of intelligence on the part of the Legislature, and of honest purpose, and at the same time of its sinister and revolutionary disposition. Altogether, it is incredible. In short, you suppose a system of legalized plunder, and that under the most aggravating circumstances.

Counsel have indulged in elaborate and abusive diatribes against the Spring Valley Water corporation, which simply seeks, at the hands of a Court of law, a determination what are its rights of property, what are the claims which the city government can properly and legally maintain—proposing to be governed by that decision.

Now, I cannot, for the soul of me, perceive upon what reason or principle or ordinary rule of construction, this question—if it is now an open question—can be determined by any other decision than the one at which you have already

arrived: the decision that cases of this character are not within the exception of the law, not covered by the provisions of the statute.

Now, if your Honors please, I could not, if I was to talk a month, put before you my views any plainer than I have done; that this provision is simply and manifestly intended to work this result: that all corporations, that all companies allowed to be incorporated for the purpose of bringing water into a city, for the purpose of disposing of it to the citizens thereof, shall, in time of great public danger, contribute to the protection of the public which gives them their rights. And you can make no more out of it. It seems to me that every simple statement of facts, every honest proposition in the premises, every legal argument on the subject, tends directly, with any fair mind, to that conclusion. And I cannot waste your time, or weary myself, with any further attempt at argument, or any continued endeavor to make this matter plainer from my stand-point, than I have done up to the present moment. I am sure, that if it is not clear to your Honors, that I am correct in these views, more must be due to the infirmity of my statement, than to any inherent defects in my cause.

His Honor, Judge McKinstry, asked Mr. Swift to say what were the limitations upon this power of demand, if there were any. And what was his reply? Why, Mr. Swift says that the public baths and ornamental purposes, like fountains, might be within the meaning of the exception. Where does he get the authority for that? Who is to judge of that—the city authorities? Accord-

ing to this theory the city authorities are the judges, and their determination is final and conclusive. That is the practical effect of his argument. They are to determine what is absolutely necessary, or otherwise, for the public use. But where is the law making them an umpire in such a case?

Accept their decision, and look at it. There would be no escape, then, from the authority in the other cases which he would enumerate, under his charitable disposition. For the city authorities may determine that public baths are absolutely essential for the public health. And the moment they make that determination, according to his theory, water for such an object is included among the great necessities. I think there is no limit to their demand, on such theory. It is either one thing, or the other. The law either gives the city government absolute control of the resources of the water company, for every purpose which they may determine proper or necessary, or there is some reasonable restriction in the premises, indicated in the language which we have so often quoted. According to my friend's theory, there is no escape from the conclusion that this company is bound to give water for public baths, and even for its fountains, if the city authorities so determine, even though it took the whole property of the corporation.

Now, if your Honors please, I do not propose to say much, if anything, further, upon this subject of what constitutes other great necessity. But I propose to submit some other considerations which, it would seem to me, upon general

constitutional principles, aid this argument, if they do not render it conclusive.

I think I could defend the decision made here in this old case, successfully, upon grounds which do not apply, or which are not assumed, in the discussion on that case. I do not propose to assume directly—although I think I could maintain it with great plausibility, to say the least of it—that the State, and much less a subordinate body, has no power, under the Constitution, to take private property without compensation, under the guise or pretense of the incorporation law, or under the pretense, by the city, of the exercise of the same power, secured by law, to permit a corporation, organized under the general law for the purpose of supplying a city with water, to enter and supply such city or its inhabitants, in pursuance of its charter and corporate rights, to carry out its purposes, to fix conditions, to exact dues and to give privileges, beyond and different from those attaching to all corporations organized under the same general law. And this by the simple subterfuge calling such ordinances, adopted and enforced by special Acts of the Legislature, contracts—as a contract. For I think it is perfectly clear that the city has no power to grant such franchises; and that these ordinances did attempt to grant franchises; and that they therefore applied to the Legislature for a special law to confirm their action. I think it is clear that these ordinances were originally void, and that they are no better from the action of the Legislature. The cases which I have cited would seem to go directly to that point. I am now

speaking incidentally, in relation to the proposition I am advancing upon these ordinances.

There is another portion of the Constitution, if your Honors please, which, it seems to me, has a direct bearing on a subject to be considered in connection with this other proposition which I shall advert to in a moment. That is, that while private property cannot be taken for public uses without due compensation, it cannot be taken at all for private use, upon any terms, without satisfactory and freely accepted compensation. It cannot be taken for private uses, against the consent of the owner, with or without consideration. There is no power to take private property, for private uses, under any circumstances, or for any consideration; they cannot take it for public uses without just compensation.

Now, this constitution, as a matter of course, is to be construed as a whole, and each provision is to be construed with reference to every other provision; one may qualify and limit and restrain the generality of the others; they are to be taken altogether—they are to be construed together.

Now, the constitution says that the Legislature may provide, by general law, for incorporations—for public and private incorporations; they may provide, by special law, for municipal corporations. Now then, in the exercise of that power, can the Legislature provide that all corporations—for it must be for all, or for none—that all corporations, for every purpose of trade or commerce, for every kind of business, must give the whole of its property to the use of the State, or any subordinate subdivision of the State, without compensa-

tion? Would anybody contend that that could be done, in so many words?—that that could be done by legislation directly? Make it a condition of the creation of the corporation that they could exact from the corporation, for public uses, all of its property to the extent of its production — the whole of its means, for public uses, without any compensation. Can it annex such a condition as that to the privilege of being an incorporation under the general law?

Now, it seems to me that it is perfectly obvious, if this can be done by the Legislature, under these constitutional provisions, it can go to any extent—even to the extent of taking the whole property of the corporation for public uses. In any given event they can take for public uses the entire production of any incorporation organized under the general laws of the State. Now, in this very case it goes to that extent. Take this very case. Not only is the corporation, by the provision of the law, required to furnish water to the extent of its means in case of fire or other great necessity, but, according to the construction of the learned gentleman, the city might now go to that extent, under the term "other great necessity," to demand its entire production for municipal purposes! The corporation must furnish to the full extent of its means, for all the ordinary purposes of the city, without stint, without limit! It is perfectly obvious that such a construction would give to the city the legal right to take the entire production of the corporation and apply it to the uses of the city, without compensation, in direct violation of the accompanying constitutional provisions to which I have referred.

Now, then, could it ever have been intended by the Legislature, in the exercise of its powers of incorporating by general law, to concede that power in any case? Or was it ever the intent of the Legislature to annex that kind of condition to the incorporation of water companies alone.

For, mark you, according to the theory advanced here, under the glitter of the flowing exordium of the counsel, this provision is made applicable to water companies alone, and no other corporations in the State.

The Legislature has never attempted anything of the kind before. In relation to no incorporation for any purpose whatever, or for any business whatever, or for any object whatever, within the power of the Legislature to incorporate, have ever they attempted to do any such thing before. This is the first instance; and not only is it the first instance here, but there does not exist such an instance in all the laws in all the States in the Union. Nor in England, nor anywhere else, can there be found a law of like provisions, or conferring like privileges, or like authority of execution or restriction! That the Legislature can annex as a condition to the right to exist, a provision that a corporation shall have its entire products at the call of the municipality in any case where it may assume there is a prevailing want or a great necessity. Assuming this power, under the general law of incorporation in the State of California! Annexing as a condition to an act of incorporation, the destructive power of appropriating the whole property, to be used without compensation!

I say that the wants of this city may swallow up all the waters that this company can bring into this municipality. And if this city may do it in supplying what are termed the ordinary uses of the municipality, then, as the counsel contends, there is the authority for making such confiscation. Why, the great park alone would swallow up all the water that any company could produce from this peninsula. It would swallow up all the sources of water on the San Francisco peninsula. And yet the city authorities can do this, according to the construction of the learned counsel on the other side! Why, they are attempting to do it now, by these ordinances and these resolutions. The very object is to compel this corporation to permit them to tap their pipes all over the city, and take therefrom water for the public parks and for all the ordinary purposes of the municipal government.

The claim is made explicitly. They go on to say, that, if they are not permitted to do this, under the plea of great necessity, the trees in the park will perish. And they claim that they can take all the water that is necessary to preserve the vegetation of the public grounds. Then they can take all the waters of the reservoirs of this company and sink it, day by day in the thirsty and unappeasable sands of the great park; and thus deprive the corporation, by the operation of law, by the very law of its creation, under the exercise of this power which is claimed, of every drop of water which they can produce; using the reservoirs and pipes and all the paraphernalia of the corporation—if I may use such a

term—for purposes of the character which I have indicated, and all under the term, used in connection with public conflagrations, "other great necessity!" It seems to me that the statement of these facts is sufficient to refute the theory and the argument of the counsel.

The theory and argument and action goes further than this. It is alleged that it is a crime upon the part of any agent of a corporation to put the slightest obstruction in the way of the exercise of this power in the manner which we have supposed.

Any candid and serious consideration of this subject, it seems to me, must bring us to put a definite limit upon the wild and wasteful and extortionate propositions of the counsel towards this company.

Now, then, it is not necessary for us to go to the length of maintaining the proposition that such a provision, inserted in the general corporation law, would be unconstitutional and void, although I firmly believe it. But we say we may appeal to this kind of considerations in attempting to arrive at what the Legislature meant when they used this term, "in case of fire or other great necessity." Did they mean to go to the length of announcing that which necessarily leads to such conclusions?—to the length that leads to the conclusion that the entire property of every corporation in the State may be taken for public uses, without compensation, and that it is criminal to resist the taking? Yes! and even criminal to come into the courts of law and ask a decision upon their rights, and determine upon questions

so grave and important, which involve the very existence of the incorporation itself!

Why, in these cases of fire or other great necessity, the very corporation itself is in danger. Conflagrations destroy cities. They sweep out of existence a whole city in an hour. And, though unforeseen as a fact, such overwhelming disaster can be anticipated by the Legislature in precisely such a case. Fires are extinguished by water. The history of the country made the Legislature to know that these conflagrations were continually happening and bearing away upon the winds of heaven or flinging into the dust of the earth all that years of industry had built up. For the great public, and for the greatest good of all the public, it was pre-eminently proper that this provision should be inserted in a law providing for the incorporation of companies whose business it should be to introduce water into the municipalities of the State. It was a simple recognition of a great and lamentable fact, ever recurring in the history of the world; and they provided for it. But they could not anticipate all these other sudden great emergencies—some of them hardly less disastrous events; and therefore they were not named; but they are placed under this phrase, "other great necessities." They could anticipate other great necessities like those—similar to those which exist in times of conflagration. And the Legislature intended to provide that this corporation should, in those great times of public danger, contribute of its means, temporarily, to the extent of its means, to save the public; but not any other

case; not in any other event. I think it is of these great necessities which I have indicated, that this law speaks with the emphasis of exaction. And I think that a simple, reasonable, ordinary, fair, obvious interpretation, will meet this case fully on the ground where the corporation now places it.

Mr. Justice RHODES. And in all those cases without compensation.

Mr. HOGE. Without compensation. I do not expect, your Honor, to deny or to discuss the proposition that the Legislature could take the entire property of an incorporation in these cases of great public necessity. I do not expect to hedge about the proposition with any technicalities or qualifications, because this corporation has not seen fit to do so, and would not support me in making any such attempt. This corporation has always been willing and ready to contribute, to the uttermost of its means, for the public safety. They have not raised that question here. They have not sought to make any nice discriminations. It has been admitted at all times, by this corporation, that the Legislature had the right to require that, in these times of great public danger and peril, the full production from the sources of water supply should be at the service of those officers of the municipality who had the public interests at that time in charge. Although we might, indeed, say that, under some circumstances, it would be unjust—although we might say that there should be specific boundaries fixed for the exercise of discretion in such cases. But it has not been so said by this corporation. An

entire willingness to contribute their entire production, in case of fire and other great necessity, has always been manifested. They recognize the fact that this service of their entire property, under the competent authority of the municipality, will be for the protection of themselves, as well as for the protection of the general public. They have privileges here, and they have risks, for which they willingly acknowledge themselves under obligations to furnish the public with the means at their command, on the occasions described by the Legislature—occasions of fire and other great necessity.

We commend the discretion of the Legislature in the general provision that, in case of fire and other great necessity, such a corporation shall contribute, to the full extent of its means, to the protection of that public which induces their existence and which secures their rights.

But does it follow at all, from this, that this company shall furnish unlimited amounts of water for all the municipal purposes of the corporation? —for all the purposes for which the government of the city needs water? That they should contribute, to the full supply of their means, to such purposes, and forever? Not temporarily—not in great emergency, and as a part of the law of their creation! That they should do this at all times and forever! That the city has the right to take possession of their works, with a force of police, under the authority of the courts, and do what they please with it!—to-day, to-morrow, and forever!—without compensation! without consideration! The proposition, it seems to me, is mon-

strous! and I repeat it, because it seems to grow as an argument in the statement on every occasion when it is turned over to the view of the Court—in any other than the peculiarly plausible language of my friend on the other side.

Now, as a plain matter of fact, the Legislature never intended any such thing. No man of sense ever supposed, when he voted for such a proposition, that he was granting power to that extent—that he was voting to put the entire property of the corporation into the hands of the municipality, for municipal purposes of the ordinary kind, without compensation. He could not so have voted understandingly; because then he would have voted in violation of his oath to support the Constitution—in express violation of the provisions of the Constitution. The Constitution takes from the Legislature all power of that extreme kind, and the Legislature cannot confer or delegate that extremity of power which it does not itself possess.

I repeat: this company has never raised the question of its obligation in case of fire or any other great necessity, to furnish the full supply of its reservoirs. And I can imagine many other cases of great necessity where the demand and the concession would be equally good. When they arise, they will be provided for. There does not exist a disposition, which counsel seems to suppose, or would attribute, to disobey in letter or in spirit the injunction of the general corporation law in this particular. It is a favorite topic with him, and he continually harps upon it, from the bengining to the end of his argument. As though

the corporation would, as a public enemy, defy the law which said that it must supply, without compensation, the city of San Francisco with its streams of water in all cases of conflagration or other great necessity! I think that the company will be found willing in the future, as it has always been, to meet this obligation. We can only judge the corporation by its past history. And, judging by its past, we may say: let the calamity come—the conflagration, or the other great necessity—and the city will be furnished with all the water that the corporation can produce, to the utmost extent of its means, for the protection of the public.

Now, then, I go a little further in this proposition; and if the necessary construction of this provision is as the learned counsel for the city contends, I ask if that constitutional provision can be maintained at all? If the necessary construction of the provision be as contended for by the learned counsel for the city, can the law be maintained, under the constitutional section which has been referred to? Now, what is the meaning, the intent and scope of that provision in the Constitution providing that the Legislature may only incorporate by general law, and not by special provision? What is the policy which dictated it? and how far does it go?

It seems to me, surely, that it was to place all private corporations, for whatever purpose of trade, or commerce, or business, upon the same plane, with the same powers, privileges, rights, etc., and on the other hand, to submit them to the same duties, obligations, and responsibilities

to the public and to the people. Now, that has been done by general law, as this Court has decided, and is plainly the meaning and construction of the constitutional provision. This is to be done by a general law under which all corporations, for whatever purpose they are formed, for whatever business within the scope of the general law permitted, they are to have the same uniform powers, duties, and obligations—uniform, extending to all corporations alike. That general law, you will perceive, is to be the charter of power and of privileges to all alike, with the same extent of power, with the same limit of obligation. All are to be alike—all are to have the same power and are to be responsible to the same obligations. Certainly that is the meaning, the policy and the intent of that constitutional provision. And it seems to me that its true meaning cannot be evaded by any species of outside combative reasoning in the premises. The Constitution aimed at the establishment of a system of incorporation, equal and uniform, by general law. Was not that the object? Was not that the object of this provision in our Constitution?

Everybody knows the evils, the difficulties, the dangers which drove some of the new States to insert this provision into their constitution; to cut off at the root all special legislation; all granting of special powers and special privileges to particular incorporators or particular classes of incorporators. It had been seen that the evil extended to all alike; that the danger was fundamental, and that the remedy must be radical. They wanted to establish one general system of

corporation which should operate equally and uniformly, giving the same powers and privileges, and exacting the same responsibilities. And they have carried out this idea in respect to all incorporations, and in every case, unless you except the water corporations of this State.

Now, I should like to know, if your Honors please, how far we have advanced in this constitutional policy, object and purpose, under the guise or pretense—call it what you please—of a general law; if the Legislature, under the guise of general law, may give to every different corporation in the State different powers, different privileges, and subject them to different duties and different obligations? if the Legislature may burden some corporations with duties and obligations, which they free others from; and may select a particular class of corporations, and a particular corporation, in a particular county and a particular locality, and give it powers and exact from it obligations and duties which do not apply to any other corporation, or to any other class of corporations, or to corporations in any other portion of the State?

If this can be done by the law which is designated "general," the whole policy and object of the provision, it seems to me, is defeated. Then you have only got to have a series of what you may please to style "general laws," which will cover particular classes, and you overthrow the provision of the Constitution with a palpable jugglery of words and terms and provisions. You are going one step farther, and having general laws which provide for particular corporations! How can that be? Giving them a certain set of

powers and privileges, and imposing upon them certain obligations and duties, while another set are burdened with different duties and bequeathed entirely different powers and privileges and authority. In the meantime where is your constitutional provision? You are supposed to give these privileges and to exact these duties with a uniformity that shall be evident in common sense legislation and under the interpretation of the Courts. But the appeal and the contest here is quite to the contrary.

Under the policy suggested and contended for, have you not evaded and defeated the constitutional provision? Have you not overthrown the very letter and spirit of the constitutional provision for which there has been so much earnest contest in all the new States where men of experience and sound judgment have had to do with the framing of organic law?

Municipal corporations may be created by special law, and that law may be amended or changed at the pleasure of the Legislature. Now, here, by this little provision, the most important privileges and rights and benefits are secured to the cities of this State; not by the law of their creation—not by any amendment to that law of their creation—not by their organic act, in any way, shape, or form, original or amendatory, but by a provision in the style of a general law of incorporation, requiring a particular class of incorporations or a particular incorporation to surrender corporation property, to the full extent of ownership, for all purposes of municipal government, without compensation. There, you have all

the whole thing. And that by the very law of their corporate creation—as a condition of the existence of a private corporation—that when cities are concerned, when the business of municipalities is involved, when they are dealing with cities or county governments, they shall contribute to the full extent of their ownership. And this is the very condition upon which they live!

Now then, may it please the Court, if this can be done in this way and shape, I see no benefit in that constitutional provision which demands uniformity of system in incorporations by a general law; nor that other provision which provides protection for private property—that great constitutional guarantee which secures and protects private property from the public grasp unless compensation is made therefor. Both those constitutional provisions, then, fall as dead letters.

Now, if your Honors please, I don't think the Legislature ever intended that any such construction should be placed upon this Act. I ask your Honors to hesitate long before you sanction the construction given to this law by the counsel for the other side—that construction which is contended for here with such earnestness and emphasis. I mean that wonderful construction which would say that this expression, used in the law, that all corporations incorporated for purposes of supplying the city with water shall, in cases of fire or other great necessity, contribute, to the full extent of their means, their water—that construction which determines that this expression means the entire absorbtion of the property of the incorporation at the will of the officers of the

municipality, for municipal purposes, without compensation. It is contended that such is a direct and legal and equitable conclusion from the general law, and there is no half-way about it.

I have already said that the corporation has never refused to comply with the provision in the cases which are undoubtedly intended to be covered by the law, although there is nothing in this case which requires me to make this statement, or this claim or this disclaimer. I don't present it in that view; but I say that such has been the history of this incorporation; and it is an answer to a large share of the personal, argumentative portion of the counsel's remarks.

Mr. Justice McKinstry. I don't know that I comprehend your argument exactly on this point. You claim that under the Constitution, all corporations formed for any purpose whatever, must be endowed with precisely the same rights, and have exactly the same obligations?

Mr. Hoge. Yes, sir; the same general rights and obligations.

Mr. Judge McKinstry. (Continuing.) That burdens may not be put upon one corporation of the same class which are not attached to other corporations of the same class, formed for the same general purpose.

Mr. Fox. All corporations of the same class.

Mr. Justice Crockett. I understand your argument to be that under the general law, corporations of this character are to be burdened with certain obligations and given certain privileges, and granted certain authority, in conformity with a general rule; that the general provisions which

apply to corporations must be observed in any law which is called a general law, applicable to corporations of this character, with respect to uniformity of rights and obligations.

Mr. Hoge. This is precisely the argument I am attempting to make under this provision. The Court has decided that this corporation is amenable to the law under the Statute of 1858, which is termed a general law, setting forth general responsibilities and rights of water corporations.

Mr. Justice Crockett. Well, do I understand you to say that the rights and obligations in each case of a corporation formed nnder the general law must be identical? that the rights and duties of a corporation having to do with a municipality, which is the creature of a special charter, shall be uniform and identical with similar incorporations in every instance?

Mr. Hoge. I don't mean to say that they shall be identical; but they shall be similar as far as the rights and duties and obligations of a corporation are concerned.

Mr. Justice Crockett. Are there not peculiar duties accompanying peculiar rights? Are there not special privileges and obligations which are to be attached to corporations authorized to act in connection with municipal corporations in this State?

Mr. Hoge. I thought I presented the limitations properly in the course of my argument. I think the general law of incorporation for the Water Companies takes in its scope all the peculiar privileges and duties which should be

attached to corporations of that character—to corporations dealing with municipalities.

Mr. Justice RHODES. It seems to me that your argument, as you presented it, would go too far altogether. The result of your argument, as it appeared to me, would be this: that we have no valid incorporations under the incorporation laws of this State, if all classes of incorporations are to be subjected to precisely the same conditions in the way of obligations and duties, and rights and privileges.

Mr. HOGE. I attempted to show that in no other instance has there been an effort to annex such conditions or exact such duties or inflict such obligations as are contended for here. In no other State in this Union, I venture to say, has any such attempt been made up to this time. Of course there are different provisions in relation to the organization of different corporations; of course the different character of business of different corporations will give a direct control in all the details of the organization and in all the minutiae of its workings; but the general principles of uniformity are to be observed in the different corporations with respect to mutuality of rights and privileges, and under the common sense construction of the law, which deserves to have the title of a general statute. In no other State in the Union has there ever been an attempt of this kind made, outside of the State of California, nor anywhere else, that I am aware of. Of course different corporations have different forms of operations; they have different sums in their capital stock — different modes of paying it in—

different percentages required. There is all reasonable license and liberty in this respect under the general law; but the powers and duties and rights and privileges are to be brought under the text which gives uniformity of operation.

Mr. Justice RHODES. I think you will find yourself very much mistaken in this proposition, if I understand you correctly. But I don't think it is necessary for your general argument.

Mr. HOGE. I don't think so. And I have intended to make that express exception. I think I could maintain this proposition. And as I have said, I think it is legitimate to resort to it for the purpose of reflecting on the intent and meaning of the Legislature in the adoption of this provision. I think it throws light upon the question as to what they meant when they used the term "in case of fire or other great necessity."

There is another proposition that grows out of this. This act of 1858 says what? It simply extends and applies the provision of general law—of the general incorporation law of '53 and '55—to all corporations already formed, or hereafter to be formed, for purposes of supplying any city and county, or city or town, or the inhabitants, with water; enabling them to sue or be sued; putting the burden upon them that attaches to any other corporation with respect to certain supplies, in the language which I have so often quoted.

Mr. Justice CROCKETT. It is about the hour of adjournment. It would scarcely be worth while for you to take up any other point.

Mr. HOGE. To what time will the Court adjourn?

Mr. Justice CROCKETT. The Court will adjourn until to-morrow morning. [After consultation.]

Mr. HOGE. I should prefer to have the case go over until Monday morning.

[The Court adjourned until the following Saturday morning.]

Continuation of Argument of J. P. Hoge.

MAY 14, 1877.

After Mr. JOHN F. SWIFT had presented an additional point [see Appendix A], Mr. HOGE continued, as follows:

Mr. HOGE. There is nothing new in the point presented. It is a mere amplification of what was discussed before you for a long time in the course of the gentleman's argument. I do not expect at present to say anything upon that subject.

Thus far in the discussion I have confined myself to what I suppose to be the questions that are common to all these cases—involved in all of them.

What I shall have to say to-day will be mainly applicable to the case of the appeal from the decision of the Fifteenth District Court in the mandamus case.

But before I proceed to offer what I have to say on that case, there are one or two other matters bearing upon the general questions involved, which I propose to notice.

The learned counsel for the city, in discussing the fourth point, in his elaborate brief, on page 43, contends that the Spring Valley Water Company is bound as the successor of the San Francisco Water Works Company, under the provisions of Order Number 46, to furnish the city with water for all municipal purposes, except the sprinkling of streets. And that the water charged for in Demand Number 895—which is the demand referred to in the mandamus case—was furnished within that duty. And that the company, while holding the property of the city, is estopped from alleging the unconstitutionality of the order, or from denying its validity.

And, in the course of his argument, the counsel seemed to rely on the idea that this ordinance was a contract still in existence and governing the rights of the parties. Out of that ordinance it would be difficult to extract any indications of a contract between the city and county and a corporation.

The ordinance or document is an attempt, as your Honors will see by reading it, on the part of the city, to grant certain privileges and rights and franchises to an existing corporation, to bring water into the city and through its streets, subjecting the corporation to onerous duties, and giving them certain benefits, privileges, and franchises different from those of any other corporation.

So far from giving any right of property, as the counsel contends, the ordinance most carefully guards against any surrender of any claims upon the part of the city and the part of the company, leaving them precisely as they were before.

The authorities of the city knew, of course, that this ordinance exceeded their powers; that they had no power to pass such an ordinance with such peculiar provisions in relation to corporations. They therefore go to the Legislature for its approval. And this ordinance received whatever validity it may have had, if it ever had any, from the Act of the Legislature alone. And as the necessary result of the decision of this Court in the 48th California, this was an exercise of legislative power within the prohibition of that provision of the Constitution on which your Honors passed in that case. And therefore the counsel, in his sworn answer as well as in his argument and unprinted brief, assumes that the provisions of the ordinance were unconstitutional and void within that decision. And to avoid the effect of that he takes the ground that this was a contract unaffected by these provisions, and that the city is the owner of the property. And when one of your Honors asked him what inference he would draw from that proposition—supposing the city to be the owner—his reply was: the company cannot charge us for water while in possession of our property.

Now assuming that the learned counsel was right in his construction of that ordinance, I do not apprehend that any such consequences would follow from it,—not by any manner of means.

The city has the right, according to the theory of the counsel, to take all the water she wishes for all her municipal purposes, because she alleges that the company is in possession of certain property of hers, and that therefore she may go to all the water sources of this corporation for supplies at her pleasure, and to any extent and for any purpose whatever. That is the corollary of his proposition: that the city owns this property and that the company is in possession of it, and therefore they have the right to go to all the sources of this company and take at their pleasure for all the municipal purposes of the city.

Now then, if this corporation is in possession of any property belonging to the City of San Francisco, it seems to me that her remedy would be very different—of a very different character from that which counsel supposes. The city would derive no right from that fact—if it is called a fact—to take the water as indicated for all municipal purposes,—by no manner of means.

Nor is the proposition aided, or put in any better condition, if we were to admit that the original character of that Ordinance 46 was just what he claims for it. It would not help his argument or position.

The City of San Francisco is the mere creature of the State government. It is an instrument of the State government; it is an arm of the State government; all its powers, all its duties, all its privileges as a public body, are within the control and disposition of the State Legislature;—entirely so.

The State, by express legislative provision, relieved the old City Water Works from these burdensome provisions of this ordinance, long before the Spring Valley Water Co. had anything to do with it or with its property; years before. That legislation, as already decided, placed the Spring Valley Water Co. and the City Water Works Co. on precisely the same plane, with reference to their rights. It has been decided that the rights of either or both of them, are to be looked for and ascertained in the provisions of the Act of 1858, and nowhere else. That was the direct decision of this Court, which disposes of the operation of Ordinance 46, with reference to these issues, in every way, and lays them entirely out of the case. It has been held, that no duties rested on the Spring Valley Water Co. in consequence of that ordinance. So it is very strange reasoning on the part of counsel, to attempt to show that the Spring Valley Water Co., when it undertook to buy the property of the City Water Works Co., thereby bound itself to carry out all the contracts that had been, at one time or another, made by the City Water Works Co., or that its individual rights were affected in any way by the provisions and condition and position of the City Water Works Co. subsequent to its organization.

In point of fact, this ordinance question does not arise at all in the mandamus case involving the $92,000; it is not set up in the pleadings in any way whatever. There is not a word about the City Water Works in all the pleadings in the mandamus case; nor is there a single word to show that the claim for which that proceeding was had,

had anything to do with the position of the old City Water Works Company whatsoever, or with its relation to the water supply, in any way whatever.

Now, in the course of this argument, the learned counsel has advanced a great many propositions that seem to me to be very novel. And not the least novel of them all, is one which I am about to mention. I think he is entitled to the claim of originality—certainly, to the extent to which this proposition goes—however opinions might differ as to the soundness of the proposition, or whether it was applicable at all to the case in hand.

One of these propositions of the counsel is, that the city and county has no power to buy water for its ordinary municipal purposes, for its indispensable necessities, and can only get it free; tracing its right to get it without compensation, to a provision of the 4th Section of the Act of 1858. And that, as a corollary from that proposition, the Board of Supervisors had no authority, no power to allow or order paid the amount which is the subject of this proceeding by mandamus; and that all acts in regard to the petitioners' claim—the judgment and decision of the Board, and the appeal—was absolutely void; and that the Auditor is at liberty, and has the legal right to disregard all this action of the Board, and may refuse to obey their decision; and may avail himself of that defence in this proceeding. Now, I state the position and argument of the counsel, as broad as he makes it. That, I understand to be the proposition. This is the proposition which lies at the very foundation of his argument, and which he

has attempted to maintain throughout all the stages of this discussion.

Now, that argument seemed to be based, if I understand it, upon this proposition: that this city government can exercise no power, except what is specifically granted in words and figures; that you must lay your finger upon the precise provision in the Consolidation Act in order to entitle the city government to exercise any power.

Now, I have always understood the rule to be just the reverse: that they might exercise all powers incidental to and necessary to the carrying out of the powers granted, or which are essential to the objects and purposes of its existence; that they may make contracts and may do things within their legitimate legislative power. I suppose that these propositions are very well settled by authority; and it is not necessary to specify or read any cases on that. Some of the cases are cited in the brief.

The Board of Supervisors are the governing power of this city and county. The State government, by express legislative provision, has put into the hands of the Board of Supervisors powers judicial, executive, legislative, and, in a general sense, financial—for the general government of the city—for the general welfare of the people of this city and county. All these powers are vested in a Board of Supervisors, by the Legislature of this State. This Board has control and regulating power over all the various departments of the city government. It has the power to make contracts, to incur expenditures, to pay bills, to entertain appeals from the reductions by the

Auditor, etc.; in fact, it has all the powers and duties which go to make up a great city government, all vested in the Board of Supervisors—all the powers necessary to and essential to the objects and purposes of a city government, and which are the very essence of such a government. All this is within the meaning of the phrase that is used — a city government; an arm of the State government, authorized duly by the Legislature to exercise all needed control and management of the affairs of the municipality, such as are unavoidably connected with the rule in a great city.

And under such circumstances, the proposition that this city has no power to buy any water for its indispensable purposes—for those purposes which are essential to the carrying out of its operations,—seems to me to be a very startling proposition, if not a monstrous idea;—a proposition, the very statement of which is sufficient to refute it. The very foundation idea of a city government would seem to have been reversed in the argument of the counsel. The practice of the city government from the very beginning, is against such an idea.

The very provisions in the Act of its creation, looking to the thousand purposes for which these municipal officers have to act as governors of the city—the supplies which are absolutely necessary to carrying on the operations of the government, and to carry out the express powers which are given to the municipality—seems to me to put such a question as this at rest forever.

The very first section of the Act that established a city government—the very first section

gives the city power to purchase, receive, hold, and enjoy any personal property; to sell and convey and mortgage, and dispose of the same for the common benefit. This is essential to the very existence of the municipality as a government; it is essential to the carrying on of its very objects and purposes; to the protection of its people; to guarding the general welfare, and to the administering of its affairs. Why, all these powers are absolutely essential; they belong to the city in very virtue of its name; they are vested there—vested in the legislative body which, by the provisions of the State law, is created—vested there as necessary to satisfactory government of this large portion of the people of the State. This body is endowed with all the powers the State can give it, to attend to the safety, happiness and protection of the community under its government. That is, all the powers that are properly to be derived from a general legislative enactment for such a purpose. But, according to this theory of the learned counsel, the city government would be unable to carry out the objects and purposes for which the government was established, and would be paralyzed at the very outset and beginning of its administration.

I do not suppose that the Legislature ever dreamt that in these provisions of the law they were stultifying themselves; and the very Acts in relation to these water supplies which we have been considering during the whole course of this argument, would show that such an idea was never extant. These Acts, of course, we will have occasion to look into presently.

But the counsel did not stop even with that proposition: that the city had no power to buy water for its municipal purposes.

He goes on to say that this corporation has no right to sell water! That its powers are confined to the furnishing of the inhabitants, and not the city, with water; that it can only sell to the inhabitants of the city for family uses, and can get no compensation from any others! That the law dedicates this property to public uses; all that is over and above what is necessary for the supply of family uses the city may take for its own use! Now, that was the length and breadth of his proposition.

Now this corporation, may it please your Honors, has all the powers and privileges, and is subject to the duties and obligations placed upon it by the Acts of 1853 and 1855, as applied to it by the Act of 1858.

No laws establish what provisions those Acts present. I have extracts of them here, to save time otherwise consumed in reading from the original text.

The first section of the Act of 1858, under which this corporation was incorporated, extends the provisions of the Act of 1853—the general incorporation law—to all incorporations already or hereafter to be formed for the purposes of supplying any city and county, or any city or town in this State, or the inhabitants thereof, with pure, fresh water.

The proviso to the 2d section enacts that all reservoirs, etc., etc., of these corporations thus formed in California, shall be used exclusively for

the purpose of supply any city or county, or any cities or towns of the inhabitants of this State, or the inhabitants thereof, with pure, fresh water.

The 3d section relates directly to the introduction of fresh water into the City and County of San Francisco.

And the 4th section required them to furnish the city and county water, in cases of fire, free of charge, etc.

And the 5th section gives them the right to use the streets of the city, under the directions of the Board of Supervisors.

So, then, it clearly appears, by the very terms of the law and of the charter of the company itself—for the law is the charter—that they became bound to do what? To supply water, to be used by the corporate authorities as well as by private consumers. And if so, then of necessity, and by law, a reciprocal obligation arises, on the part of the city, to pay for all water thus consumed, except for the purposes of fire, or other great necessity; which last clause relieved the city from the necessity of paying for water for such purposes.

If the proposition of the counsel is correct, then the City and County of San Francisco is the only community in this State which is denied this essential power; because all other communities possess the power under the provision of the Political Code. And I suppose the City and County of San Francisco has the duties, and is liable to the same limitations of power that attach to any other community in the State, except where there may be different provisions in the Consolidation Act which are still left in force.

Now, this company was incorporated under these laws of 1853 and '5 as applied by the Act of 1858, as is admitted. And it has all the powers and rights that the law gives it.

The counsel seemed to contend that the certicate of incorporation limited it.

The certificate is not here in the record. And the pleadings say that the company was incorporated under these Acts, and was endowed with all the rights and power furnished by these Acts. But if it is not so, it don't make any difference whatever, if it does not so appear in that form; because the powers are from the law, and not from the certificate.

Mr. SWIFT. The certificate shows the purposes for which they organized.

Mr. HOGE. They organized under that law, for the purposes which that law designates, and have all the powers given by that law, and are liable to all duties under that law.

The CHIEF JUSTICE. I understand that the certificate is not in the record.

Mr. HOGE. No, sir.

Mr. FOX. It is set forth in one of the briefs in the former case.

Mr. SWIFT. You allege it.

Mr. HOGE. The company was organized with all the authority and all the obligations which the law prescribes. If the counsel were right in his proposition, it would withdraw us from the operation of this provision in the Act itself, which prescribes that, for certain purposes, the company should furnish water free of charge. Because, according to his reasoning, they could not—at one

time they could not—charge the city at all for any purpose whatever. Directly to the contrary is the provision of the law that was inserted industriously, which relieves the city from some charges in certain specified instances. Otherwise the city would be in the same position with any other consumer of water within the corporation. But the law provides that they shall not pay for it when used for fire or other great necessity. I shall have occasion to refer to that law presently on another proposition of the counsel.

In connection with this proposition the counsel has made or assumed another one—and attempted to sustain it by a great number of authorities—on the subject of tolls. The proposition, if I understand him, is this: that the Spring Valley Water Company cannot recover from the city, because no rates have been fixed, in pursuance of the provisions of law upon which he relies. The Company cannot charge either the city or anybody else — for the argument goes that length—until the rates are fixed. And he claims that the Company is bound to cause these rates to be fixed, before they have any power to charge anything. And as a corollary from this proposition, he derives the result that the city has the right, in all time, to take this property and use it at its pleasure, without compensation; that, I understand to be the proposition.

Now, if your Honors please, it seems to me sufficiently apparent, upon an examination of this statute, that these authorities have n't the slightest application whatever—these authorities which the gentleman has cited have n't the slighest

application or bearing on the real question; these authorities are in relation to the grant of franchises, to take toll, etc. Now, then, the power to charge for water does not come from, and is not based upon, this clause in the Act at all—this clause in relation to rates.

The Act of 1853—this Act, which the Act of 1858 applies to this corporation, in its 4th Section gives the power to the corporation.

The 1st Section reads as follows (reading):

"Corporations for manufacturing, mining, mechanical or chemical purposes, or for the purposes of engaging in any species of trade or commerce, foreign or domestic, may be formed according to the provisions of this Act; such corporations, and the members thereof, being subject to all the conditions and liabilities herein imposed, *and to none others.*"

The 1st Section of the Act of 1858 reads as follows (reading):

"The provisions of an Act entitled an Act to provide for the formation of corporations for certain purposes, passed April fourteenth, one thousand eight hundred and fifty-three, and the provisions of an Act entitled an Act to amend an Act entitled an Act to provide for the formation of corporations for certain purposes, passed April fourteenth, one thousand eight hundred and fifty-three, and passed on the thirtieth (30th) day of April, one thousand eight hundred and fifty-five, shall extend to and apply to all corporations already formed, or hereafter to be formed, under said Acts, for the purpose of supplying any city and county, or any other cities and towns in this State, or the inhabitants thereof, with pure, fresh water."

The 2d Section of the Act of 1858 reads as follows:—

"Any company incorporated for the purposes specified in the preceding section, shall have the right to purchase, or to appropriate and take possession of, and use and hold, all such lands and waters as may be required for the purposes of the company, upon making compensation therefor. The mode of proceeding to appropriate and take possession of such lands and waters, when the parties cannot agree upon a purchase thereof, shall be the same as prescribed in sections twenty-seven, twenty-eight, and twenty-nine, of an act to provide for the incorporating of railroad companies, passed April twenty-second, one thousand eight hundred and fifty-three, except that such proceedings shall be had before the county judge of the county in which such lands or waters, or both, may be situated; *provided*, that all reservoirs, canals, ditches, pipes, aqueducts, and all conduits heretofore built, or that hereafter may be constructed by any corporation formed under this Act, or claiming the privileges, rights, and immunities herein granted, or any of them, shall be used exclusively for the purpose of supplying any city and county, or any cities or towns, in this State, or the inhabitants thereof, with pure, fresh water."

Here is a provision which has already been the subject of decision by this Court. Here is the power to purchase, hold, sell and convey such real and personal estate as the purposes of the corporation shall require.

In the case of the Miners' Ditch Co. *vs.* Zellerbach, in the 37th Cal.: in the case of Martin *vs.* Zellerbach, 38th Cal., I think these questions all came up, and were all discussed. As to the

power of a corporation, given under these Acts, to sell its entire property, to dispose of its entire property; rendering it really impossible for it to carry on its operation. And the Court sustains the power. The Court say they have the power to dispose of their entire property.

Now, the powers of this Water Company come from the Act of 1853; not from this clause in relation to rates—not by any manner of means.

They have the right to dispose of any property which they acquire. They have the right to acquire any property which their purposes demand, and they have the right to dispose of it. They have the right to obtain and hold, and sell and dispose of. It is not a grant of title at all; it is a corporation selling its property.

And hence the argument of counsel, in this particular, is inapplicable.

The argument of counsel—in order to apply his cases with reference to tolls—assumes that water isn't a subject of property at all. He assumes that if it were oil, or any other species of property, the rule would be different, and that the company would have the right to dispose of it.

The Act of 1858 requires that the company should furnish water, at reasonable rates, to the citizens of the city; and shall furnish water to the city, under certain circumstances, free.

In order, then, to give the government of the city the power to say that these rates are reasonable—to compel them to be reasonable—the Act gives this power through a certain proceeding. A commission may be appointed to ascertain these rates. This is for the public protection.

It is not a limitation upon the right of the company to sell that which it can sell, at all events. But it is to compel the company to charge reasonable rates.

The initiatory steps in the exercise and application of that power must come from the city government, and not from the corporation Board. And it would be difficult to find out from this irregularity, that the city was entitled to take the water for nothing, because no rates had been fixed by the authorities under this provision of the law. And yet it is assumed that there is such an irregularity. Yet she may take and use this water, and refuse to pay for it. Because she has initiated no proceedings which would give her any right for the protection of the people, to insure reasonable rates; because she has never taken the initiative in the formation of a commission for the fixing of such rates, so that the company may be restrained within reasonable limits; the right of the city to have water for all municipal purposes is assumed and argued! I say it is preposterous to assume that this entitles the city to take the water at her pleasure, and then refuse to pay for it. These rates are for the inhabitants of the city and not the city. The power to charge for the water does not come under this provision; but it is a provision giving authority, on certain proceedings, to ascertain that the rates charged the inhabitants are reasonable.

It is organic in the creation of this Company—the right to acquire property and hold it, and dispose of it. The only limitation is that the Company shall not charge unreasonable rates to

the inhabitants of the city and county. In order to secure all needed protection to the public, that provision is inserted, and the city has not seen fit to exercise that power.

The counsel has been continually talking, during the course of his argument, and has even assumed it as an admitted fact, that these charges were outrageous. I don't think the counsel knew what he was talking about when he alleged that these charges were outrageous.

Mr. SWIFT. It is so charged in the answer, and admitted by the demurrer.

Mr. HOGE. No, sir; no, sir; there is no demurrer in any case except in the mandamus proceedings; and there the demurrer is, that the facts are not sufficient to constitute a defence. This is based upon the idea that the Board of Supervisors, in their final decision, were the only power that passed upon that account, and that they had passed upon that account; there is no admission of that sort, not in any sense; the counsel can't show it. There is no admission that the charges were outrageous and excessive.

Does the counsel know what the charges are; I believe that the charges are based upon the estimate of ten to fifteen cents per thousand gallons. That must be the price which the counsel denounces as outrageous and excessive, if he sticks by the reference in the record. The bill was made upon that basis. Water is charged to the city for municipal purposes, at the rate of ten to fifteen cents per one thousand gallons; while the rate to a private consumer would be about a dollar, I believe.

The counsel don't seem to understand what is the function of a demurrer at all. I shall not waste time to enlighten him on that point. It is sufficient to say we have admitted nothing of the kind; that his constant assertions that we have admitted that our charges are outrageous and excessive are not founded upon the record or the fact.

In point of fact, these rates, as authorized to be fixed in this law, are for the inhabitants, and not for the city at all. The agreement of the city to take water, implied or expressed, is sufficient for our purposes. She takes the water, and then she agrees to a fixed price which she is willing to pay. It is very clear that these rates never were intended to be applied to the city. They would have no kind of application. The city is to take water in immense quantities, and the rule requiring the authorities to fix certain rates for private citizens, for family uses, would have no application whatever to the demands of the city for water for her great purposes. This view is manifest on its face.

Everybody knows, who has ever made any inquiry on the subject, that no water corporation charges a city at the same rate which she charges private parties for family use. There is no kind of analogy between the rates. The corporation charges little or nothing for the thousands of gallons necessary for the operations of a city. The operations of a family, for family use, are relatively small, and the tariff is based on an entirely different theory.

Mr. SWIFT. The theory is, to get all that you can.

Mr. HOGE. Well, now, Mr. Swift, you have had the opportunity of talking here two or three days, and I will be obliged to you, if you will permit me to proceed with my argument without further interruption.

Mr. SWIFT. I will not interrupt you again.

Mr. HOGE. You can interrupt me at any time, Mr. Swift, in regard to any matter where you need information, and if I have it, I will give it to you.

Mr. SWIFT. I beg your pardon, Colonel, I will not interrupt you again.

Mr. HOGE. (After a pause.) Besides, it aint true. It is not the fact. Counsel is eternally indulging in this kind of charge and abuse, which is based on nothing but his own imagination.

He admits that if this property was like oil or goods, the rule would be different. I believe I have taken down his very words:

"If it were oil, or wine, or goods, if it were merchandise, they would have a right to charge." Then the rule would be different.

I had supposed that the property interest of the corporation in this water was quite as perfect as if it were oil, or wine, or goods. It is the very property which the law authorized the corporation to acquire and sell. That is, under the very law of its creation. There is not a word in it about tolls, and his authorities have no application to the proposition in hand.

The grant of franchises for tolls is, of course, controlled by the language of the grant. The

toll is to be applied to the very things which the law authorized the toll to be charged for. What has that to do with the operations of the corporation in buying and selling its property? It has the same right to go into the market and sell its property, unless restrained by the operations of the provisions of the law, that any private owner of property has. It occupies no different position from any private owner of property. It is a concentration of private wealth in a particular form, to carry on a particular business, with full powers of acquisition and disposition, with reference to the purposes for which it was formed.

Now, if your Honors please, I propose to say what I have to say upon this mandamus case.

Now, what are the facts upon which these questions here involved in the mandamus case arise, and what were the provisions of the statute bearing upon it? I think, if your Honors please, it will be found, on examination, that the decision of this Court heretofore very often made, involving the power of the Board of Supervisors, and the effect of their action upon the questions over which they have jurisdiction, apply with ten-fold force to the facts of this case we have now in hand, and to the provisions of the Consolidation Act itself—that Act which created the Board of Supervisors a special tribunal, with powers to pass finally and judicially upon all claims against the city and county, and which rendered the decision of the Board binding and conclusive upon all the officers of the city and county government.

It is not disputed, and could not be disputed, that the Board had jurisdiction, judicially, over

every claim against the city and county; the express provisions of the Consolidation Act give them that power.

This proceeding was simply a mandamus, saying, or directing, that the Auditor be required to make certain entries in his book, as a result of a certain decision of the Board of Supervisors, over a matter with regard to which the Board had entire and full jurisdiction.

Now, the answer of the Auditor proceeds upon the theory that he has power of review over the decision and final action of the Board of Supervisors, in relation to claims against the city and county; that, although the Board may allow and order paid a claim, he may refuse to act, because he may be of the opinion that the Board acted in insufficient evidence — that the Board decided wrongly in the exercise of their powers, though the action was upon final review by them on an appeal. His theory is that their decision does not bind him at all—that he is at liberty to go behind it. Now, that is their proposition and their entire answer.

According to our theory of the Consolidation Act and its provisions, the Board of Supervisors is a governing body of the last resort, with respect to every matter pertaining to the city's interest; and after the proceedings shall have been had, as in this case, the action of the Board, under the powers given it, is conclusive, and no authority is given by the provisions of the Act to any subordinate officer to review the action of the Board of Supervisors upon matters within their jurisdiction after the final appeal.

Now then, Article 5, of Section 70, of the Consolidation Act—I will give your Honors the substance of these sections, without reading them—gives the Board the power to hear and determine appeals over the executive officers of the city and county, in the cases provided for in the Act. But in all cases of appeal taken to the Board of Supervisors, from the order or decision made by any other officer or officers, such officer shall furnish the Board of Supervisors with a statement of the reasons for the order or decision appealed from; and the party appealing shall also be heard briefly, and without the observing of any technical rules or other formalities, before the Board of Supervisors, in answer to the officer rejecting any claim, in regard to the justice of the decision. The Board shall endeavor to ascertain the true state of the case, by inquiry, without delay, and shall then finally determine upon the matter.

This section, then, if your Honors please, evidently intends to give the Board the power of official decision, without reference to any formalities or technicalities, such as would be observed in a Court of justice. It gives to the Board a power of official review of the decision in any case, of any officers of the city, on a claim passing through these channels.

But it does not stop at that. The 92d Section provides that if any person feel aggrieved by the decision of the Auditor, or other officer, in the rejection or refusal to approve or allow any demand upon the treasury, presented by such person, he may appeal and have the same passed

upon by the Board, whose decision thereon shall be final. And if the Board approve and allow, the demand due shall afterwards be presented to the Auditor, and entered in a proper book, in like manner as every demand allowed by law; and a corresponding endorsement must be made upon every claim or bill by the Auditor, in due form, before it can be paid. This must be done, before a claimant is in any position to pursue his legal rights at all. He cannot take another step towards procuring the payment of his claim until this is done.

Then comes the ninety-third Section. This provides, that, in all such appeals, the Board of Supervisors shall call to its aid the law officer of the government,—the District Attorney,—and shall require his opinion, in writing, which shall be read and filed. And then on such an appeal, and in all cases of approval and allowance of any such demand, a vote shall by taken by ayes and noes and entered upon the records.

Now, then, it seems to me that we have in this section the whole scheme leading to the final action of the authorities of the city government upon all these questions. And these provisions of the Consolidation Act cover entirely the case in hand, completely and finally.

Now, then, to hold that, notwithstanding these provisions of law, the Auditor can defy the Board of Supervisors, and can set up his opinion against that of the Board—contrary to their action and final decision—contrary to the determination that they were necessarily bound to make in the manner prescribed—they inquiring into and deciding

all questions having relation to the claim—all questions of law and fact—seems to me ridiculous in the extreme. If that be so, then this executive officer has centred in himself all the powers of the Board of Supervisors—all the powers of the city and county government. And the city government must stop and stand still, unless their action coincides in all respects with the action which is justified in the opinion of the Auditor of the City and County of San Francisco.

Of course we have been contending all along through the progress of this case that this final decision of the Board of Supervisors leaves the Auditor as a mere ministerial agent to carry out the decision of the Board. We contend that the question as to whether this or that claim should be allowed, was precisely the question that was submitted by the law to the final decision of the Board of Supervisors. And that law provided that their decision should be final and conclusive, in terms. And in order to enable the Board to take this action understandingly, and with due reference and respect to the law, they are required to consult the law officer of the government and to take his opinion in writing, filing it and voting upon it, or upon the claim thereafter, by yeas and nays. And to contend that after that a right of review still remains with the Auditor,—that there is any room then for him to exercise an honest judgment or discretion in the premises against the conclusive action of the Board, so far as it is concerned, seems to me a most extraordinary proposition,—something which amounts to a plain innovation upon the letter of this law.

In my judgment, the propositions here involved are covered by the previous decisions of the Court. The case of Waugh *vs.* Chauncey, *et al.*, 13 Cal., 11, is a case in hand. I have an abstract of it here, if I can find it. This Court said there : "The Board of Supervisors of the county is a special tribunal, with mixed powers—administrative, legislative, and judicial. A jurisdiction over roads, ferries, and bridges is given to it by the State. Its judgments or orders cannot be attached collaterally any more than the judgments of Courts of Record." Its judgment upon matters committed to it is conclusive. "Its judgment or orders cannot be collaterally impeached; whether it acted upon sufficient or insufficient proof, regular or irregular, the decision is final and conclusive."

And so in the case of Tilden *vs.* the Board of Supervisors of Sacramento County, 41 Cal., p. 68. There, in that case, the Board of Supervisors rejected a claim. Mr. Tilden then obtained a writ of mandamus from the court below, commanding the Board to allow a specified portion of the claim. From this judgment the Board sought an appeal. The Court held, when the Board acted judicially on a claim a writ of mandate would not be issued to reverse or review its judgment.

In our case the Board allowed the claim and ordered it paid ; and our application was for a mandamus to compel the Auditor to do his ministerial duty and make the proper entries as directed by law. Whereas he seeks to review and reverse the opinion and judgment of the Board. In this other case the Board rejected the claim.

In one case they allow it ; but in no other case can the matter be investigated on mandamus. The question is decided to be foreclosed.

In the case of the Truckee and Tahoe Turnpike Co. *vs.* J. B. Campbell, 44 Cal., p. 89, the Court say ; "It will not be contended that the Board did not possess competent authority to determine whether all the requisite facts existed, and whether the corporation had performed all the acts necessary on its part to entitle it to the grant of the right to collect tolls. The authority of the Board being conceded, the question whether the Board erred in its exercise cannot be raised by a private person ; and, clearly, the inquiring will not be entertained in a collateral proceeding."

It appears to me that these authorities are directly applicable.

I am not discussing the question of total want of power in the Board to allow this claim upon the theory contended for here: that they are entitled to this water free of charge by the operation of provision of the fourth section of the Act of 1858. We have already discussed that. My argument is now aimed at this other proposition, that they cannot go behind the decision of the Board of Supervisors, upon questions of fact, and re-examine in matters of this kind; that they cannot inquire into the regularity or irregularity of the action of the Board. They cannot go behind the action of the Board, and say that it didn't do this or that which was proper; that the Board did not pursue, literally, the directions of the statute. We contend they cannot inquire into the terms or matters for which water was

furnished, such being matters of fact necessarily before the Board and necessarily included in its decision. It is to these objections that I am addressing this argument. I am insisting that the decision of the Board of Supervisors is necessarily final and conclusive as its jurisdiction over the entire claim and authority to investigate into all the facts connected with it; and that this must be so under a necessary construction of the Act. The action of the Board is conclusive upon the Auditor. He has but a ministerial duty to perform. He has no power of review over the facts upon which the Board acted and predicated their decision. Nor has he a right of construction over the law.

If the decision of the Board is subject to review, the appeal must be to the courts, in the proper case, and with the proper parties; but of this hereafter.

The Auditor must perform his duty in the premises, as I have already suggested, before the claimant is in any position to enforce his rights in any way.

The answer, in this case, attempts to go behind this decision of the Board upon the facts. It questions the reasonableness of the charges of the company, and whether it had furnished the water as charged. And this is a part of counsel's argument—that the charges were excessive. Was not that a question of fact to be submitted to the Board of Supervisors on which their decision is conclusive? The very facts upon which they were passing, embraced all these questions, or affected them — had reference to them; and the

whole thing was conclusively decided by the final action of the Board proving and allowing the claim which was brought up to them on appeal. These are the very facts, I say, upon which the Board acted when they passed upon the account originally; and then it is brought up again on appeal from the Auditor's decision.

The question of the power which they have attempted to raise in relation to the 4th Section, I have already discussed. I do not propose to discuss it any further.

The answer admits the fact that all this water for which the account was entered and claimed was furnished, but avoids it, or attempts to avoid it, because, as they say in the answer, the company was bound to furnish water to the city free of charge. Upon this question, also, the Board of Supervisors passed.

The answer enumerates several purposes to which the city applied the water; but contends that the company was bound to furnish it free, under the provision of the 4th Section of the Act referred to, which provision requires them to furnish water for fires, and in case of other great necessity. And that is the only provision they do advance. The whole theory before the Auditor was, that this water was bound to be furnished free; that the city ought to have it of right, without compensation. And upon that theory, the Auditor said: the Board exceeded its power and allowed an amount which they had no right to grant. It is a question of power based on that ground, and on that alone; that this was free water, and could not be charged for; and, there-

fore, the Board exceeded its powers in passing the account—allowing the account for water which belonged to the city, as the counsel contends.

It is attempted to raise another proposition, and complicate the matter by asserting that the Treasurer could not act and pay this claim for precisely the same reason; that the Treasurer would raise the same point and had the right to do so; that the Treasurer was not bound by the decision of the Board on appeal. By the express language of the Consolidation Acts, which is still binding on all the officers of the city government, the final power of decision is lodged in the Board of Supervisors.

I say that the Treasurer has nothing whatever to do with this question. The Auditor cannot defend his refusal to do his duty in this manner. He cannot refuse to act in obedience to the exact command of the Consolidation Act, which action is necessary in order to put these parties in a position to prosecute their claim. Whatever may be said with reference to the Treasurer's action, it does not help the Auditor in this case. It does not help him to say that the Treasurer would not pay us if he did this ministerial duty and made the proper entries in his books. In fact the Treasurer is as much bound by the decision of the Board on the appeal as the Auditor. But with that matter neither the Auditor nor ourselves have anything now to do by way of consideration.

As a matter-of-fact we cannot take a single step further towards procuring the payment of this claim until the proper action of the Auditor is had by way of entry upon the records of his office.

Because it is the express language of the Consolidation Act that this entry must be made—that this action must be had on the part of the Auditor before the claimant will be in a position to place his demand before the Treasurer at all.

One other proposition made in this case was that the Board of Supervisors had repealed this resolution; which I shall have something to say about at the proper time, if I have an opportunity of discussing it.

Mr. Swift. The appeal is taken from the order overruling the demurrer.

Mr. Hoge. Yes, sir; Judge Dwinelle decided that there was no ground of defense in the answer; that the facts set up there as an answer did not state a defense. The appeal is taken from that order. There was a demurrer to the answer.

Mr. Swift. And to the complaint also.

Mr. Hoge. Yes, sir; to the complaint also. Both. Though I take it that the demurrer to the complaint was disposed of by the answer.

I will not stop to go over all these authorities which I have here. I think they are all cited in the brief sustaining the propositions which I have made; but I shall not consume the time of your Honors to read them.

There was a point made in the argument of Mr. Swift, for the purpose of showing that the Board of Supervisors had exceeded its powers—that there was an item for water that was used by the schools. On that I desire to say a few words.

Now, in point of fact, the pleading in this mandamus case don't raise any such question at all. It goes entirely upon the ground that the water

was furnished the city for the indispensable purposes of the municipality, under the provision of the 4th Section of the Act of 1858, under which the company was incorporated, and was therefore to be furnished free of charge. Now, let us see if that is not so ; and you Honors will find, if you read this answer, that every one of these particular defenses is based on that theory, entirely and alone.

Mr. Justice McKinstry. Does the answer in that case allege anything in relation to the rates?

Mr. Hoge. No, sir.

Mr. Swift. I beg your pardon. It says that no rates have been fixed.

Mr. Hoge. I think not.

Mr. Swift. You are mistaken, Colonel.

Mr. Hoge. Well, I don't recollect; I don't recollect that the answer says anything further than to allege that the charges are excessive.

Mr. Swift. It says they were never fixed. It says the rates were never fixed.

Mr. Hoge. Let us see. (Examining.) I don't recollect that.

Mr. Justice McKinstry. Perhaps it is not worth while to stop and examine in regard to that. I thought you could state at once.

Mr. Swift. It will be found on page forty-six. (Reading.)

Mr. Hoge. Very well; I had forgotten that that was there.

I was speaking now on the subject of this charge or itemized separation of a charge for schools. I have said all that I want to say on the subject of rates. I don't want to repeat that.

Now, what is alleged in respect to this matter? (Reading.)

Here is the item, separated, amounting as they say, to $13,800. That is the form in which it is placed as to the school department; and as to every other purpose for which it was alleged water was used, it raises the question in the same way.

It is alleged that this is free water, and that therefore the Board exceeded its power and right in auditing this bill, because it was free water—not because the Board had not power to buy water, but because it was free water, and that therefore the Board could not buy this water.

I say that the particular purposes for which the water was furnished is a matter with which this petitioner has nothing to do. Our account was for water furnished to the City and County of San Francisco for municipal purposes, and the city agreed to the charge for it, and allowed it, and ordered the bill paid. It makes no difference how or where it was used in the municipal government. It is a matter of entire indifference how the city or its officers used this water, or applied it to different municipal purposes. That does not concern the company who furnished the water to the city or to the city officers, or for the claim of the company or the validity of the action of the Board in its final decision. The company did not inquire into the particular purposes for which the water was used, and it was not necessary that it should do so. This does not affect the claim, nor the validity of the action of the

Board in any respect. They had the right to determine this matter, and they did determine it.

This is not a claim against the Board of Education. It is not sought or attempted to interfere with the funds of the Board of Education in any way. It is only for claims against its own funds that that Board has any jurisdiction under the Consolidation Act. The Board of Education has nothing to do with this claim. When their funds are called upon by any claim, they have a right of action; they will pass upon such a claim. But we have not brought them here as debtors, and they have nothing to do with this question.

The city could not in the present aspect of the case, raise this question. It takes the water of the company and uses it, and then it allows an account for it which forecloses that question in regard to the matter. It seems to me that upon these facts the decision of the Board is conclusive and that the thing could not be brought up here for question.

Why, if your Honors please, these were the very facts, among others, into which the Board were to inquire, and into which they did undoubtedly inquire.

Now a great deal has been said, if your Honors please, in relation to this authorization No. 1132. It was not published, it is said. And attention was drawn to the fact that it was only for twenty-three months, as is alleged;—that there was a variation between the appropriation, etc.

Now, if your Honors please, I think a few words will put that matter in a very clear light, so that

your Honors will be enabled to understand it thoroughly and completely.

The original bill presented by this company to the city was for $103,500. It was for furnishing water upon the orders of the municipal authorities for municipal purposes from the first of February 1869, to November third, 1872,—forty-six months; $2250 per month, which just makes the sum of $103,500. Now upon this account thus presented, was based the action of the Board of Supervisors in the passage of Order 1132.

The history of this account, as your Honors will find it,—I don't know whether your Honors have got it or not—is in a brief filed by the City Attorney on the argument of this case in the Court below.

You will see from that that this account takes the ordinary course of legislative business of this kind.

So the Board reversed the action of the Auditor and approved this account, passing it by a unanimous vote.

All these things are recited in the petition, I believe, with the exception of that first vote, and not denied.

Now with reference to this account, something was said about section 68. One moment on that subject. Let us see whether it has any application or not. This is the ordinary mode of proceeding upon all claims presented to the Board of Supervisors. And it is in direct conformity with section 68 of the Consolidation Act. (Reading): "* * * * Every ordinance or resolution of the Board of Supervisors, providing for any specific

improvement, the granting of any privilege, or involving the lease or other appropriation of public property, or the expenditures of public moneys (except for less sums than five hundred dollars), or laying tax or assessment, and every ordinance or resolution imposing a new duty or penalty, shall, after its introduction in the Board, be published, with the ayes and nays, in some city daily paper, at least five successive days before final action by the Board upon the same; and every such ordinance, after the same shall pass the Board, shall, before it takes effect, be presented to the President of the Board for his approval. If he approves, he will sign it; if not, he shall return it, within ten days, to the Board, with his objections in writing.

"The Board shall then enter the objections on the journal and publish them in some city newspaper. If at any stated meeting thereafter two-thirds of all the members elected to the Board vote for such ordinance or resolution, it shall then, despite the objection of the President, become valid. Should any such ordinance or resolution not be returned by the President within ten days after he receives it, it shall become valid the same as if it had received his signature."

Now this is the only publication ever required by the Act.

Whenever a resolution to appropriate money from the treasury is introduced, and immediately upon its introduction, a vote to print is taken. They might refuse to print, and reject, right then and there, on the first introduction of the proposition. But if they choose they direct it to be published, with the ayes and noes on the order directing it to be published. After this is done—after this publication is had, then the matter comes back and comes up for action like any

other subject. First the publication is to be made immediately upon the introduction of the claim. Then it comes back for action. Then the Board may pass it or reject it or amend it. No other publication is required by law, nor is there ever any other made in any case.

Now, what is done when the account comes back?

When it comes back it is amended and passed, and approved by the President of the Board of Supervisors.

Now there is no other publication required of the bill, and there would be no sense in requiring any other publication.

The proceeding is analogous, I suppose, to our our ordinary legislation in State Legislatures. First, there is printed what is called a resolution of appropriation or a resolution of intention. This is like the publication of a bill before a Legislature for the appropriation of money. It is published and laid on the desks of members for the information of members, and after it has been published, and when it is reached in order, it is taken up and acted upon. The same in this case. Then it is either rejected or passed or amended. Here, it was amended. This is precisely the course which this resolution took, as appears by the record. As I say, the proceeding is analogous to that in our Legislatures; and I presume it was modeled after it.

There is no question about the publication having been made in this first instance—none at all. The publication was for the appropriation of $103,500. The Board cut down the sum to

$92,000, and the company agreed to take that sum. The original amount was for $2,500 a month, which would amount to $103,500 for the forty-six months; and the sum was cut down to $2,000 per month, which would amount to $92,000.

Mr. Justice McKinstry. There was no publication of the ordinance as finally passed?

Mr. Hoge. There was nothing but this first publication of the ordinance or resolution of appropriation. That was published, as I presume all similar publications are made, for the information of the people. It attracts the attention of the people to it; and if they desire, they can manifest their sentiments in regard to it, by protest, or petition, or otherwise; and after due course of publication, the matter comes up for final action, and the Board takes action upon it. Of course the members of the Board can be approached in the meantime, and influenced by argument, or in any legitimate manner, either for or against the bill. When the matter comes back, it assumes the form of law.

There is nothing, then, but the first publication of the ordinance appropriating the money. That publication is for the information of the people. It directs attention to the fact and the purpose of the appropriation. The people may take notice and appear and protest, if they so desire. Or they can appear when the matter comes up for final action—when the Board is to take concluding action on the subject. And, as I have said, the members can be approached and influenced by arguments pro and con, as the public, which has been duly notified, sees fit to exercise the privi-

lege. Then, by the subsequent action referred to, it assumes the form of law.

Mr. Justice McKinstry. If you will pardon me, not wishing to interrupt your learned argument, the mingling of these statutes and these ordinances and resolutions, seems to complicate the matter. At least, I am not certain whether I thoroughly understand the statement. Let me see if I do:

There was a claim presented to the Board of Supervisors, before this alleged ordinance was introduced; which claim was for the sum of $103,500.

Mr. Hoge. Yes, sir; a claim for $103,500. Upon that the first action took place. That was the basis for the action.

Mr. Fox. The first account, as passed to print, was for $103,500.

Mr. Justice McKinstry. That was the amount, taking the whole estimates for a given number of months together?

Mr. Hoge. Yes, sir.

Mr. Justice McKinstry. This claim having been presented, then an appropriation, or an authorization to appropriate money to the amount of $103,500 was passed?

Mr. Hoge. Yes, sir. An authorization or appropriation of money must be made whenever there is a contemplated disbursement of money in excess of $500.

Mr. Justice McKinstry. The amount of the appropriation depends upon the amount of the claim submitted?

Mr. Hoge. That is the basis of the appropria-

tion. That is passed when the claim is presented. That is the ordinance of intention. That is notice that the Board are going to entertain this claim, and the appropriation is drawn up, usually, in accordance with the amount of the claim. Upon the introduction of any claim, or of a certain number of claims aggregating so much, the Board take and vote as to whether the appropriation of the ordinance shall be published or not; and when that ordinance has been published five days, then the Board are competent to act upon it directly.

Mr. Justice McKinstry. Well, you understand that, in any case, a claim of a specific nature must be first presented, before there is authority to appropriate moneys at all.

Mr. Hoge. I presume that the appropriation must be made according to the amount of the claim or claims—or approximately so—before the Board will take the first action in the premises. At least, that is the custom, according to my information. I don't suppose, however, that there is anything in the law, or in the rules of the Board, which prescribes an identity of the amount in the claim presented and the appropriation and the amount finally passed. But it is customary to follow the introduction of a claim, if it be on its face a valid one, with an appropriation fitting the amount therein specified.

Mr. Justice McKinstry. In this case, the amount was presented for $103,500?

Mr. Hoge. Yes, sir.

Mr. Justice McKinstry. Is there anything to prevent the Board from increasing the amount

finally passed upon in the bill, after the publication of this appropriation, or notice of the appropriation?

Mr. Hoge. Well, it is not very likely that the Board would exceed the amount fixed in the original ordinance of appropriation, when they come to formally act upon the bill. They may certainly make an appropriation, finally—that is, by the passage of the final bill—less than that in the original ordinance of intention. Certainly the appropriation does not carry with it, necessarily, a minimum limit for the amount to be acted upon. The Board have power to appropriate moneys for the payment of any claim not exceeding $500, at the time the bill is introduced, at the time the claim is submitted. But on all claims exceeding $500, they must first pass an appropriation bill. It cannot affect the validity of that appropriation if the sum finally agreed to be paid, and specified in the final passage of the claim, does not exceed the amount specified in the appropriation notice. Here in this case, there was an appropriation of $103,500, and the claim was finally passed for $92,000, much less than the amount of the original appropriation. Whether the actual expenditure of money shall come up to the sum of $103,500, or shall fall short of it, depends on the ultimate action of the Board on the account. At this stage, they have taken no absolute action on the account at all. The presentation of the account sets the Board in action—in motion. When the account is presented, after the five days shall have expired, they may approve or reject the claim.

Mr. Justice McKinstry. But there is no attempt at that time to decide whether the appropriation finally, the auditing or accepting or approving finally, shall be within the $103,500?

Mr. Hoge. The Board determine that, when they finally act upon the claim. This account said $103,500. The Board finally passed the claim for $92,000. They refused to pass upon the account for more than $92,000. And the company agreed to take $92,000. And when the company ascertained the determination of the Board, they presented this claim in the sum which was satisfactory, to wit, $92,000.

Mr. Fox. The amount finally passed, cannot exceed the amount of the original appropriation.

Mr. Justice McKinstry. Well, do you say that the words, "not to exceed" are in the appropriation ordinance?—and do they affect the appropriation in such a way as to fix the exact amount of the claim as ultimately acted upon by the Board?

Mr. Fox. We contend that it does not effect the power of the Board to finally appropriate any sum less than the amount put in the original ordinance of intention.

Mr. Hoge. It is an appropriation of a given amount of money, based upon a certain claim and manifestly for a specified object. The amount of the claim finally acted upon, may reach $103,500; or the Board may pay out less than that amount under that publication. But the Board may not pay more, it appears. Indeed, that would be the construction or the limit, without any specific words to that effect. There is an appropriation of so much money in the treasury which may or

may not be required for a certain claim or claims. The amount may not be called upon at all; it will not be until the action of the Board after the five days shall have expired.

Mr. Justice CROCKETT. Is there any provision in the Consolidation Act whereby the appropriation must be made explicit before or after an account is passed upon and allowed by the Board?

Mr. HOGE. None further than has been stated.

Mr. Justice CROCKETT. But the original notice of intention, or appropriation ordinance, must correspond to the original amount of the claim or claims presented to the Board.

Mr. HOGE. That is the practice. This appropriation is a particular legislative action. It is analogous to the action of our legislative bodies or executive officers. The appropriation itself is legislative action; then the approval of the account, directing the drawing out of the money under that appropriation, is judicial action. This is done afterwards, before any money can be actually taken out of the treasury.

The Board is set in motion when claims are presented to it for allowance; that is, if they think they are right, or if they appear to be valid upon their face. They might, it is very true, refuse to make any appropriation whatever in connection with any given claim or claims. They could reject a bill, as I have stated, just as a legislative body could, on the first reading of a bill, order it rejected. There is an express motion in the preliminary minutes to that effect.

In this, the legislative action of the Board of Supervisors corresponds to the rules of practice

in all legislative bodies. They might reject at the outset; but it is not usual to do so. It is usual to make an appropriation corresponding with the amount of the claim. It is not considered respectful in legislative bodies, to move the rejection of a bill on its introduction; and unless it is palpably wrong, such a motion never will be made by any member of a legislative body, who has proper courteous respect for his fellow-members. The respectful and ordinary method on the introduction of a bill, as your Honors well know, is to send it to a committee, although the Legislature can, in either House, reject it forthwith, on presentation. But the bill is usually sent to a committee. There it is investigated—if it is considered worthy of investigation—and reported upon, etc., taking the usual familiarly known course of legislative proceedings.

The action upon this appropriation bill or ordinance, in the Board of Supervisors, is analagous to that first action which takes place in all legislative bodies, when any measure is introduced by a member of the Assembly or the Senate.

The further analogy brings in the executive officers of the State. That is to say, there is an appropriation bill passed by the Legislature and signed by the Governor. Having become a law, the executive officers of the State, under it, are empowered to determine upon the validity and justice of all claims which may be presented under the several funds of the State; and with their auditing the bills so passed.

Now, the Board of Supervisors act legislatively and judicially, in the manner which I have

suggested. First, the appropriation bill, and then the explicit consideration and passage of the claims coming under that appropriation, and on account of which the appropriation is declared to have been made.

Mr. Justice CROCKETT. I should have considered that the most appropriate method and order of the proceedings would have been to first pass upon an account—consider and determine how much money was actually needed—and then pass an appropriation bill to meet it.

Mr. HOGE. That might have been the practice; but it is not the ordinary action of the Board of Supervisors. I do not suppose that they are very learned men, ordinarily, as legislators, speaking of them intentionally, with very great respect.

But, as I have suggested, when they approve a bill, they act judicially. When they make an appropriation, they act as legislators. They provide a fund for the meeting of a claim or claims presented to them. Then they act specifically and directly upon the particular claim or claims to which the appropriation had reference.

Your Honors will bear in mind all the time, that here the Board refused to pass upon the claim for any more than $92,000; and the corporation finally agreed to that amount; and that amount was passed upon by the Board.

Mr. Justice CROCKETT. You say they first pass an appropriation of money, and then pass a resolution or ordinance—such as this appropriating $92,000 — the original appropriation being for $103,000. That would be making an appropriation outside of the sum required to meet the

claim presented or finally acted upon. What is done with the surplus? What effect does that have upon the appropriated amount which is not used? Suppose they drew nothing on account of this appropriation?

Mr. Hoge. The money will remain there. It is like an Act of Congress making an appropriation for a particular purpose; the money may never be drawn out, and frequently it never is. And there are acts of Congress innumerable upon the statute book, providing for the use of money heretofore appropriated and unemployed. That is a very ordinary thing in Congressional legislation.

Mr. Burnett. There haven't been any laws of that kind passed Congress during the last twenty-five years.

Mr. Justice McKinstry. I understand the suggestion on the other side to be this, substantially: The claim shall be first allowed. That is to say, the bill for the appropriation shall be according to the allowed claim, or according to the amount that is to be allowed. So that the incorporation and the public shall have had an absolute notice of the exact amount of the bill to be passed—of the amount in the application on a claim for public moneys, where the sum is over $500.

Mr. Fox. That is exactly what they did here.

Mr. Justice McKinstry. (Continuing.) There is to be a certain sum of money in the appropriation bill or ordinance, of the expenditure of which the public have due notice by due publication. I understand the other side contend, that in this instance there was not that publication of an in-

tended appropriation which was anticipated and provided for by Horace Hawes or some other of the legislators co-operating with him in the passage of the Consolidation Act. I understand the other side to suggest and contend, that wherever a sum greater than $500 is to be paid upon any claim, the antecedent appropriation bill or ordinance shall explicitly state the amount which is to be finally approved, and which is finally approved; and that that exact sum must be published in an ordinance of appropriation, before a bill can be legally passed, or a claim legally allowed, by the Board under an appropriation notice. Now, here is a notice for the sum of $103,500—a notice of appropriation, for a certain purpose, of that amount. And here is a final passage of a claim for $92,000, for the object specified in the claim, which was originally for $103,500. And no ordinance of intention or appropriation for $92,000 was ever printed. Of this the other side complain.

Of course it all turns upon the construction to be given to the statute. I understand the view on the other side to be, that the sum of money in the bill that is finally passed, must be named in the appropriation ordinance that is printed.

Mr. Justice Rhodes. There are these two sets of resolutions required: resolutions of authorization, and resolutions of allowance or approval of the claim. The two are necessary.

Mr. Fox. Yes, sir.

Mr. Hoge. There is no provision in the law on the subject, except this, which appears in the rules of the Board: that they shall pass an appro-

priation bill or ordinance, before final action on any claim, or claims exceeding $500.

Mr. Justice RHODES. That is in the law?

Mr. HOGE. That is in conformity with the law. The appropriation is one thing, and the approval is another. As your Honor says, there are two sets of resolutions, and this is their order.

Mr. Justice RHODES. The only question in my mind is, as to whether by the proper construction of the statute, the Board are obliged to act up to the precise amount in the appropriation ordinance. In other words, whether an appropriation in excess of the sum which is finally allowed on a claim, is a good and valid publication of the notice of intention for that claim.

Mr. HOGE. There is no provision for a publication at all, except when the claim is first introduced.

Mr. Justice RHODES. It might be contended on the other side—and perhaps is—that no appropriation is made except in consequence of, and in connection with, the claim allowed.

Mr. SWIFT. Yes, sir.

Mr. Justice RHODES. Here there was a claim for $103,500; an ordinance of appropriation was passed for that amount. Then the Board proceeded to investigate the claim; and they finally passed upon *a* claim for $92,000.

Mr. HOGE. Yes, sir; but what they did afterwards was not required to be published.

Mr. Justice RHODES. Well, *is there* anything in the Statute that absolutely requires or contemplates two sets of resolutions: one of authorization, and the other of allowance of a claim?

Mr. Justice McKinstry. In other words: Can an allowance of a claim be duly had upon a publication of a notice of intention to appropriate more than $500, and yet less than the sum actually finally passed and approved, with respect to the particular claim?

Mr. Hoge. In answer to your question, I have read already the 68th section. That provides for the legislative action; that provides for the appropriation. That is to be approved by the Mayor; it becomes a law on his signature. That resolution or ordinance is approved by the Mayor.

Then, when we turn to Section 85, we read as follows:

"All other lawful demands payable out of the treasury, or any public funds of said city and county, and not hereinbefore in this section specified, must, before they can be allowed by the Auditor, * * * * be first approved by the Board of Supervisors; or, if the demand be under $200, by the President and two members thereof, appointed by the Board for that purpose." * * *

That does not require any action on the part of the Mayor at all.

The analogy is perfect to the legislative action in an appropriation bill. An appropriation bill appropriates a certain amount, or not to exceed a certain amount, for certain purposes—for certain claims or demands made, or to be made, against the State. Then these demands come up before the different offices or officers of the governmental department for action, and if they are allowed or passed or confirmed, their status and validity is determined by that act. Then they are paid

out of that previous appropriation which had required legislative action, and legislative action alone.

Mr. Justice McKinstry. When the Board meet to levy taxes, they are required to determine how much shall be levied for each fund.

Mr. Hoge. Yes, sir.

Mr. Justice McKinstry. Isn't that substantially an appropriation of money?

Mr. Hoge. No, sir. That is merely done for the purpose of fixing the amount of taxation. That fixes the taxation list. That is to ascertain what amount is to be raised and where certain sums shall go—into this and that fund, and for such purposes; there being a general title to certain divisions of county and State money.

Now, there is a discrepancy on the face of this resolution in regard to dates. The resolution of intention provides for an appropriation for the payment of a bill between certain dates, embracing a period within four years. When you come to this last resolution or approval, it approves a claim covering the whole case, but giving the dates from January 1st, 1871, to Nov. 30, 1872. It is evident that this must have been an accident or a clerical error, because the reference is clear and explicit all the way through to this identical claim.

The Board having intimated its intention to approve for not more than $92,000, the Spring Valley Water Company agreed to present their bill for that amount; and this resolution cuts down the appropriation for the purpose specified,

and authorizes payments only to this extent, to wit, $92,000.

It is said that the company did not present their claim originally for this amount. Of course they didn't. That is significant and undenied, and everywhere asserted. But the company afterwards presented a demand for this express sum, and the Board allowed it. It was approved unanimously, and it was approved by the Mayor, although that was unnecessary. This is not denied by any portion of the answer; on the contrary, it is admitted. That bill, that final account, was in the terms of the original claim, precisely; for the same portion of time.

It is exactly similar, except in this particular: whereas, the former claim was for $2,250 per month—the amount in the original bill—this claim is for $2,000 per month, making the sum of $92,000 instead of the sum of $103,500.

There could have been no mistake as to the time intended to be covered by both parties, by the final appropriation.

But then comes Resolution 4022. That takes up the account on appeal, and passes upon it, and provides that it shall be in payment of this water, up to Nov. 30, 1872.

This is not, and could not be controverted in the answer. The allowance was within the appropriation. And it was clearly understood by both parties to cover the entire claim as originally presented in the original $103,500 account.

These, as it seems to me, were all matters of fact, to be submitted to the Board on appeal. They were facts; and the Board passed upon them.

There was something said about advertising, as required in the 69th Section of the Act. It doesn't seem to me that any question of advertising figures in this transaction, one way or the other—not at all. It is not within the provision of the 69th Section at all. This is not required to be advertised :

"All contracts *for building and printing* to be done for the said city and county, and *ordinary supplies for the subsistence of prisoners*, must be given by the Board of Supervisors to the lowest bidder offering adequate security, after due public notice for not less than five days," etc.

There is nothing in the answer that raised any question upon this matter of advertising. It is referred to in the argument, but not raised in the issues at all.

Mr. SWIFT. There is an express provision for the procuring of water for school purposes; that is enumerated among the purposes for which appropriations may be made by the Board of Education.

Mr. HOGE. Well, I have already answered that portion of the gentleman's argument, and stated all I desire to say on that subject.

[The Court took a recess for one hour.]

Continuation of Argument of J. P. Hoge.

MONDAY AFTERNOON, May 14, 1877.

Mr. HOGE. May it please your Honors, I will continue but a very few minutes longer. There are one or two propositions I wish to say a few words on.

I understand, Mr. Swift, that you have taken the position that a certain section of the Consolidation Act applied as a statute of limitations on this claim, and cut off the power of the Board to allow it.

I think the section referred to is Section 90 of the Consolidation Act. [Reading.]

"SECTION 90. The salaries, fees and compensation of all officers, including policemen and employees of all classes, and all teachers in common schools, or others employed at fixed wages, shall be payable monthly; and any demand whatever upon the treasury, hereafter accruing, shall not be paid, but shall be forever barred by limitation of time, unless the same be presented for payment, properly audited, within one month after such demand became due and payable; or if it be a demand which has to be passed and approved by the Board of Supervisors or Board of Education, then within one month after the regular session of the proper Board, held next after the demand accrued, or unless the Board of Supervisors shall, within

six months after the demand accrued as aforesaid, on a careful investigation of the facts, certify that the same is in all respects just and legal, and that the presentation of it, as above required, was not in the power either of the original party interested or his agent, or the present holder, in which case it shall be barred in the same manner unless presented for payment within twenty days thereafter."

That section has no application in a case like this.

The judgment here, by express provision of law, is not payable until audited, and until the Auditor shall make these entries in his record. Under these circumstances, the statute hasn't begun to run at all—if that is the statute in force.

But he also shadowed forth the idea or proposition that this claim was barred, in consequence of the company having, for a certain number of years, given water to the city without claiming any compensation. That is his proposition, if I understand him.

Mr. SWIFT. I made that as an argument.

Mr. HOGE. The meaning of the law referred to by counsel in this branch of his argument, is a subject for judicial decision.

I refer to a case reported in the Chicago *Legal News*, decided by the Supreme Court of the United States. There are two cases. In these cases it is held that the construction of the law is a judicial question, to be settled by the Courts and the judges. The laws of a State are to receive their authoritative construction from the State Courts,

and that construction, when fixed by the State Courts, is binding on the U. S. Courts. That which purports to be the law of a State is, or is not the law, according as the true fact may be, and not according to the shifting circumstances of the parties. It would be perfectly immaterial what construction these parties put upon the law. That don't affect the question one way or the other. This Court is to decide as to what the law is.

There is another proposition assumed in the case, although the counsel did not discuss it. I don't recollect whether, in his brief, he has discussed it or cited authorities upon it. That is, that the resolution of the Board, after the initiation of these proceedings, had been repealed by subsequent resolution; and that that justified the action of the Auditor.

That proposition is very thoroughly discussed by the learned Judge of the District Court who decided this case. His opinion is in the record, and the authorities there cited.

I have a large number of additional authorities which were not cited by the Judge of the District Court, which I will not take up time now to examine and comment on. With the permission of the Court I may add them to my brief.

The matter is very thoroughly discussed in a case cited, where the opinion was delivered by Judge Field. It is in the 2d Wallace. When a perfect right of action has accrued on a contract which is authorized by a statute, neither the contract nor a suit pending for its enforcement will be affected by the repeal of the stat-

ute. Of course, if I am correct in my proposition as laid down here, there could be no repeal of the decision of the Board, of its own motion, after these proceedings were introduced. After the judgment of the Court had been acted upon by the parties, and an account, in pursuance of that judgment, had been approved and allowed, no appeal of this kind can affect the question.

Where these questions generally come up they are questions arising on State legislation. Where a Legislature undertakes to repeal a former statute, the question arises as to how far private rights are affected by the exercise of legislative power in a given case. There is a question as to how far a Legislature could repeal previous legislation under which rights have grown up. But I never heard of a case before where it was attempted to be asserted that an inferior corporate body or board could, upon their own motion or resolution, change the effect of their contract or liability to third persons, whether that contract was express or implied; and especially where the contract had assumed and taken the form of a judgment, it, as we contend, is conclusive of the rights of the parties. In this case at bar here, the property of the plaintiff has been devoted to the uses of the city for a very long period of time, and this has been done with the knowledge, and with the assent, and upon the order of the government of the city and all its authorities. A claim is presented for this property. This Board take up the account, they pass upon it judicially, and allow a claim, and order it paid. And now, when a case comes here involving the question as

to whether the officer, whose duty it is to enter the approved account in his book, shall perform his prescribed service, it is alleged that the Board has repealed the resolution and judgment by which the claim was allowed, and that, therefore, this officer can't take any action upon it. It seems to me that the proposition is absurd upon its face.

There is another proposition involved here that is very much discussed in some four or five cases by our Supreme Court, in relation to implied contracts and the liability of corporations, and municipal corporations as well—with reference to implied contracts. In such a case as this, the law implies liability on the part of the city to pay for such property. In the case of executory contracts, the rule would be different.

These matters are fully discussed by our Supreme Court in the cases of the Gas Company *vs.* San Francisco, 9th Cal., 469; Argenti *vs.* City of San Francisco, 16th Cal., 282; Pixley *vs.* Western Pacific R. R. Co., 33d Cal., page 33; McCracken *vs.* City of San Francisco, 16th Cal., 631; and in Dillon on Municipal Corporations, sections 383 and 4, and notes.

I have gathered these cases here together. They hold clearly that municipal corporations stand upon no higher plane than the ordinary corporations; that both are, like individuals, subject to the rules of justice; and contracts are implied under the same circumstances in all of them. If the city obtained the money of theirs, it is her duty to refund—not from any contract, but from the general obligation to do justice which binds

all persons, whether natural or artificial. If she obtained other property which does not belong to her, it is her duty to restore it; or, if used by her, to render an equivalent in due manner from the like general obligation. In these cases she does not, in fact, make any promise on the subject; but the law, which always intends justice, implies one, and her liability, thus arising, is said to be a liability upon an implied contract, and it is no answer to a claim resting upon a contract of this kind to say that no ordinance has been passed upon the subject, or that the liability of the city is void when it exceeds the limit of the charter.

The obligation is imposed by the general law, and is independent of any ordinance and the restraining clauses of the charter. This is the law as stated in Argenti *vs.* the City of San Francisco, pages 282 and 283.

Now this reasoning would apply very strongly to the case which is before the Court.

I look upon all these provisions—these minutiæ requisitions of the Consolidation Act, as to the form of the accounts and the indorsement of their numbers upon them, etc.—as simply directory to the officers; that they do not affect the merits of a claim against the city. The Board act judicially, under the power given to them to pass upon all such claims and accounts, and have the endowed right to dispose of them as they see fit, and I hold that their decision is conclusive, without respect to any attention to mere punctilios of appearance in the premises. Their authority, and the conclusiveness of their action, does not depend upon compliance with every

technical rule or proceedings. But under their general judicial power to approve and dispose of claims which come before them, they act in a final and binding manner. If the Board does not comply with all the minute particulars of forms which may in any instance be prescribed, that does not in any manner affect the validity of their action or its conclusiveness in the premises. And no officer can go behind that action, and say that certain little requisites have not been complied with—that certain publications have not been had—that certain indorsements have not been made on a particular bill or claim. If the Board does not resort to technical modes of defeating an honest claim, but, in the pursuance of its undoubted powers, approves and allows and orders paid our claims, the subordinate officers, having but a ministerial duty to perform, can't get behind the action of the Board and refuse to perform their duties in carrying out the decision of the Board, which they have declared to be final. You can no more go behind the action of the Board of Supervisors, in such a case as this, in the manner which has been attempted here, than you can go behind the judgment of the District Court or of the Supreme Court, on the ground of some technical informalities in the clerical record of the proceedings of these tribunals.

These are matters over which they have jurisdiction, and nobody can gainsay that fact. Apart from this question in relation to furnishing water free, they have jurisdiction over the whole subject matter. It is submitted to them, and they are

created by the law the special judicial tribunal to pass upon all these things; and when they have done so, the mouth of the subordinate officer is closed.

Now, I do not propose to go into a number of these questions—collateral questions and side issues—which have been discussed so much. I think I have taken up the main propositions and considered them. I have stated all I desire to say upon them.

The briefs will contain the authorities upon these matters which I have discussed; and now I shall, as far as I am concerned, submit the case upon what I have said.

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